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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAS VEGAS, NEVADA
In re: USA COMMERCIAL MORTGAGE)
COMPANY.)
) Case No.
) 2:07-CV-892-RCJ-GWF
)
_____)

PARTIAL TRANSCRIPT OF PROCEEDINGS
OF
MOTION TO VACATE PRELIMINARY INJUNCTION, NO. 779
AND
SEALED EMERGENCY MOTION TO APPROVE
GRAMERCY COURT SALE, NO. 902
AND
MOTION TO SUBSTITUTE ASSET RESOLUTION
AS ASSIGNEE BY VIRTUE OF FORECLOSURE
OF COMPASS USA'S SERVICING RIGHTS
UNDER THE LOAN SERVICING AGREEMENTS,
AND SUBSTITUTE ASSET RESOLUTION
AS ASSIGNEE BY VIRTUE OF FORECLOSURE OF COMPASS USA
WITH RESPECT TO THE PRELIMINARY INJUNCTION, NO. 908
VOLUME 1
BEFORE THE HONORABLE ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

Monday, March 16, 2009

Court Recorder: Araceli Bareng

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 APPEARANCES:

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17 Christina Knoles,
18 Arthur Kriss,
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1 (Court convened at 11:26:03 a.m.)

2 (Partial transcript.)

3 THE COURT: We'll get one party on the phone.

4 (Colloquy not on the record.)

5 THE CLERK: Ms. Chubb? Ms. Chubb?

6 (Colloquy not on the record.)

7 THE CLERK: Ms. Chubb?

8 MS. CHUBB: Yes.

9 THE COURT: Thank you.

10 Let's start with appearances on USA Commercial.

11 On the telephone, please, Ms. Chubb.

12 MS. CHUBB: Yes, your Honor. This is Janet Chubb
13 appearing for the Jones Vargas direct lenders, and I'd like to
14 introduce Michael Collins of Bickel & Brewer who will be
15 representing some direct lenders. We filed his pro hac vice
16 papers this morning.

17 THE COURT: We're not picking you up very clearly.
18 Are you directly on the line or on a speaker phone?

19 MS. CHUBB: I am not on -- let me -- is this better?

20 THE COURT: That's much better.

21 MS. CHUBB: Okay. Now I'm on the speaker phone --

22 THE COURT: Oh, there you go.

23 MS. CHUBB: -- which I know I'm not supposed to be,
24 but for now, so I'll start over.

25 This is Janet Chubb for the Jones Vargas direct lenders,

1 and in the courtroom is Michael Collins from Bickel & Brewer
2 who will be representing some direct lenders. I don't know
3 which ones, yet, and we filed his pro hac vice papers this
4 morning.

5 And because I have to leave, your Honor, I would like to
6 say that the Bickel & Brewer arrangement is such that I hope
7 the Court will find it acceptable. It's substantially
8 different than the one that you disallowed, previously, and
9 Mr. Collins can go into that.

10 And I also want to disclose that McGowan Duncan (phonetic)
11 associated with Cross will be advancing expenses, but there is
12 no encumbrance of the interest. It's a pure contingency
13 matter.

14 THE COURT: Thank you.

15 MS. CHUBB: Thank you.

16 THE COURT: Appearances in the courtroom, please.

17 MR. COFFING: Terry Coffing on behalf of the
18 receiver, Tom Grimmett.

19 MS. RASMUSSEN: Lisa Rasmussen on behalf of
20 Cangelosi, Castillo, Chaudhry, Eller, Graham, Hess, Knoles,
21 Kriss, Lafayette, Lucas, Maraden, Mortensen, Newman,
22 Schoonover, Simon, Tengan, Westbrook, and Zawacki.

23 THE COURT: Thank you.

24 MS. SHUMENER: Good morning, your Honor.

25 Betty Shumener --

1 THE COURT: Thank you.

2 MS. SHUMENER: -- on behalf of CCM Pathfinder
3 Pompano Bay, LLC, and CCM Pathfinder Gramercy.

4 THE COURT: Thank you.

5 MS. KISHNER: Joanna Kishner of DLA Piper also on
6 behalf of those same parties.

7 THE COURT: Thank you.

8 MR. LANGBERG: Mitchell Langberg on behalf of
9 Platinum Properties 1 which is not a party to any motion today,
10 your Honor.

11 THE COURT: Okay.

12 MR. ASHINOFF: Good morning, your Honor.

13 THE COURT: Good morning.

14 MR. ASHINOFF: Reid Ashinoff of Sonnenschein, Nash
15 & Rosenthal for Asset Resolution and Silar.

16 THE COURT: Thank you.

17 MR. FORSTOT: Good morning.

18 THE COURT RECORDER: I'm sorry. Can you --

19 MR. FORSTOT: Jonathan Forstot.

20 THE COURT RECORDER: -- please repeat your last name
21 (indiscernible)?

22 MR. ASHINOFF: Ashinoff, A-s-h-i-n-o-f-f.

23 Thank you.

24 THE COURT RECORDER: Thank you.

25 MR. FORSTOT: Good morning. Jonathan Forstot also of

1 Sonnenschein on behalf of the same parties.

2 MR. HOWARD: Good morning, your Honor.

3 Randolph Howard, Kolesar & Leatham, local counsel for
4 Silar Advisors, et al.

5 THE COURT: Thank you.

6 I believe we have three matters on calendar, the motion to
7 vacate preliminary injunction, the sealed motion to approve the
8 Gramercy sale, and a motion to substitute various parties.

9 I'd like to suggest since we maybe have a basis for
10 resolving it that we present first or discuss first the
11 emergency motion on the Gramercy sale.

12 And then, potentially -- Ms. Chubb, are you already gone
13 or --

14 MS. CHUBB: Your Honor, I am here. I really do have
15 (indiscernible) my (indiscernible).

16 (Colloquy not on the record.)

17 MS. CHUBB: But Lou Bubala will be sitting in.

18 THE COURT: Okay. So we'll let you go at any time,
19 but maybe we can resolve this one. As I understood it, as long
20 as it's consistent with the objections -- that is accounting
21 and segregation of funds, and that there is no waiver here of
22 any of your claims to these funds -- that you did not object to
23 the sale.

24 MS. CHUBB: As long as -- this is Janet Chubb. As
25 long as (indiscernible) is no waiver to any of the funds,

1 including the funds that are paid out, that's correct.

2 MR. HOWARD: Your Honor, if I might remind the Court,
3 this motion was filed under seal, and we'd like to make sure
4 that the privacy of the transaction involved retain the
5 confidential interest or --

6 THE COURT: Okay.

7 MR. HOWARD: -- the handling of the confidential
8 interest.

9 THE COURT: There is no confidentiality vis-a-vis the
10 direct lenders in that note, right?

11 MR. HOWARD: Absolutely not.

12 THE COURT: It's full disclosure to them. It's just
13 otherwise to the public.

14 MR. HOWARD: Correct. And to any other counsel who
15 don't represent any --

16 THE COURT: Okay.

17 MR. HOWARD: -- direct lenders on the Gramercy
18 matter.

19 THE COURT: Any objection, then, to my approving this
20 sale, just simply approving this sale, without further argument
21 from those who are involved in the secrecy obligation of the
22 sale?

23 MS. RASMUSSEN: I --

24 (Colloquy not on the record.)

25 MS. RASMUSSEN: I would have objections to place on

1 the record, but not necessarily to the sale if that's the
2 limited ruling at the moment, but I --

3 THE COURT: That's all we're intending to do.

4 MS. RASMUSSEN: Okay. Okay.

5 MS. SHUMENER: Your Honor, the only thing I would
6 request is that the funds that are in dispute be placed with
7 the receiver in an interest-bearing account, so that there is
8 no question or a concern about where the funds are.

9 MS. RASMUSSEN: And I would join that request.

10 MR. HOWARD: Your Honor, I object to any last-minute
11 requests. I don't believe that was in the opposition. There's
12 a separate motion --

13 THE COURT: Uh-huh.

14 MR. HOWARD: -- for a receiver.

15 THE COURT: I do think I have to deny that request,
16 but there's a clear understanding here that the funds are
17 segregated, separately accounted for, and under all of the
18 constraints that Ms. Chubb asked for.

19 And you will be presenting an order approving this sale
20 with those conditions, the lack of waiver, of course, and
21 you'll be circulating it to counsel who are involved in that
22 representing direct lenders in that note.

23 MR. ASHINOFF: Your Honor, if I may? I think that
24 I'd like to add a little precision to this discussion. There
25 is a list on page 6 of our reply memorandum of the various fees

1 that are in dispute.

2 There's also a list of the postclosing base-servicing fees
3 and the advances that have been made which your Honor's
4 preliminary-injunction order at paragraph 6 allows for the
5 distribution of what I -- what I think I understand the Court's
6 saying is that we can follow the procedure under paragraph 6,
7 and the lenders won't waive any rights to make some complaint
8 about that, but that we can follow --

9 THE COURT: I'm not sure how to answer that question.
10 That would be my assumption, too, but I just don't know without
11 looking at it item by item.

12 Is that your understanding, Ms. Chubb?

13 MS. CHUBB: Well, as long as we have recourse against
14 those fees which we may challenge in the future, I did not
15 object to their being paid out.

16 THE COURT: Okay.

17 MS. CHUBB: And they are the advances which are as I
18 recall about 700,000 in attorneys fees and the postconfirmation
19 servicing fees, but they would be still subject to a callback
20 if we should prevail down the road.

21 MR. ASHINOFF: Your Honor, if --

22 THE COURT: The advances, I'm not sure why you would
23 object to the advances. Default interest or late fees,
24 et cetera, that I can certainly understand the objection. Are
25 you objecting also to the attorneys fees or --

1 MS. CHUBB: Well, we have not --

2 THE COURT: I'm sorry.

3 MS. CHUBB: 700,000 just seems like a lot of money to
4 resolve one loan. I'm sure they got billed for it, so
5 (indiscernible) reasonable.

6 THE COURT: Uh-huh. This is a \$30,000,000 loan.

7 MS. CHUBB: It is, your Honor.

8 THE COURT: Well, as long as you're conceding there
9 is recourse, they're not waiving their right, why don't you put
10 that in there.

11 You do have the right to pay it out in accordance with
12 your assumption, but as long as it's understood there is no
13 waiver of right here.

14 MR. ASHINOFF: Your Honor, my understanding of the
15 injunction is that it was the result --

16 THE COURT: Okay.

17 MR. ASHINOFF: -- of --

18 THE COURT: Then I guess I'm going to have to
19 clear --

20 MR. ASHINOFF: Yeah.

21 THE COURT: -- the courtroom, so that we can get into
22 it because, apparently, you do disagree.

23 (Colloquy not on the record.)

24 THE COURT: You do want a waiver of right.

25 MR. ASHINOFF: Sorry?

1 THE COURT: You do want a waiver of right.

2 MR. ASHINOFF: Your Honor, the paragraph in the
3 preliminary injunction speaks to --

4 THE COURT: I'll clear the courtroom --

5 MR. ASHINOFF: -- preserving --

6 THE COURT: -- then, please. We'll just have the
7 parties who are representing direct lenders in this loan
8 and/or -- you apparently have a contest over whether we should
9 approve this sale or not.

10 (Courtroom cleared at 11:34:46 a.m.)

11 (Colloquy not on the record.)

12 MS. RASMUSSEN: Your --

13 (Colloquy not on the record.)

14 MS. RASMUSSEN: Your Honor --

15 (Colloquy not on the record.)

16 MS. RASMUSSEN: -- I'm sorry. Just for a
17 clarification --

18 (Colloquy not on the record.)

19 MS. RASMUSSEN: -- do the direct lenders who have an
20 interest in Gramercy need to leave? Are we talking --

21 THE COURT: No.

22 MS. RASMUSSEN: Okay. They can stay --

23 (Colloquy not on the record.)

24 MS. RASMUSSEN: -- if they have --

25 THE COURT: If they are represented --

1 MS. RASMUSSEN: -- an interest.

2 THE COURT: -- and a party here. Are they a party
3 here?

4 MS. RASMUSSEN: I --

5 (Colloquy not on the record.)

6 MS. RASMUSSEN: I don't know the answer to that. I
7 know I represent four people with an interest in Gramercy.

8 (Colloquy not on the record.)

9 MS. RASMUSSEN: But I don't believe --

10 THE COURT: Those four people --

11 MS. RASMUSSEN: -- any of mine --

12 THE COURT: -- may remain and, of course --

13 MS. RASMUSSEN: Right.

14 THE COURT: -- counsel representing them.

15 (Colloquy not on the record.)

16 MS. RASMUSSEN: And I don't know if any of my four
17 are here, but there are some people --

18 THE COURT: People who --

19 MS. RASMUSSEN: -- who are here.

20 THE COURT: -- don't have a direct-lender interest in
21 Gramercy, I'll ask just for a few minutes, ten minutes,
22 five minutes only, if you'll vacate the courtroom.

23 MS. RASMUSSEN: Okay. Now, is --

24 (Colloquy not on the record.)

25 MS. RASMUSSEN: Because they're not represented by

1 counsel?

2 (Colloquy not on the record.)

3 THE COURT: No. Because they're not --

4 MS. RASMUSSEN: I mean, if they --

5 THE COURT: -- not a party.

6 MS. RASMUSSEN: If they do have an interest, but they
7 don't have counsel, may they stay? I'm sorry.

8 THE COURT: Yes, they may.

9 MS. RASMUSSEN: Okay.

10 (Thereupon, Lisa L. Cline concluded as transcriber,
11 and Michele Phelps commenced as transcriber
12 at 11:35:46 a.m.)

13 (Colloquy not on the record.)

14 MR. COLLINS: Your Honor?

15 (Colloquy not on the record.)

16 MR. COLLINS: Your Honor, this is Michael Collins on
17 behalf of Bickel & Brewer. As Ms. Chubb says, I'm proposed to
18 appear today subject to my pro hac being granted on behalf of
19 the Jones Vargas direct lenders.

20 A number of other lenders want to retain us. We have not
21 appeared for them, yet. One of them is people with interest in
22 the Gramercy loan.

23 THE COURT: On that --

24 MR. COLLINS: I have not been --

25 THE COURT: -- proposed basis, you may remain, but

1 you're subject to the confidentiality sealing with respect to
2 your various clients who have no interest in Gramercy.

3 MR. COLLINS: Absolutely, your Honor.

4 (Thereupon, the proceedings were sealed
5 at 11:36:27 a.m.)

6 (Thereupon, the proceedings were unsealed
7 at 11:48:51 a.m.)

8 (Colloquy not on the record.)

9 THE COURT: Thank you so much for your patience and
10 indulgence.

11 (Colloquy not on the record.)

12 THE COURT: Let's go now to the motion to substitute
13 and then, finally, the motion to vacate.

14 (Colloquy not on the record.)

15 THE COURT: In that order, please. I've read the
16 pleadings, of course, the objections. I'll entertain your oral
17 arguments on that motion, to substitute Asset Resolution --

18 MR. ASHINOFF: Thank you, your Honor.

19 THE COURT: -- and the servicing rights and with
20 respect to the preliminary injunction.

21 (Colloquy not on the record.)

22 THE COURT: Basically, I'll tell you where my mind is
23 on this, so that you can address it. There's a difference
24 between -- is it 26, Rule 26 -- what -- substitution of
25 parties.

1 MR. ASHINOFF: 20 --

2 THE COURT: There's a difference between allowing a
3 party to substitute in and approval of substitution of those
4 parties into the servicing rights and into the protection
5 because they've been allowed to intervene the protections of
6 the preliminary injunction. There's a difference.

7 Under Rule 26, I have to let them intervene, of course.
8 Basically, the way I come out on it is I haven't reached final
9 conclusion on all of --

10 (Colloquy not on the record.)

11 THE COURT: -- DLA Piper's complaints on some of the
12 items. It seems to me that there's a very good argument on
13 Piper's complaint about how the right to late fees and default
14 interest is limited by the term "collected".

15 I do not agree with their point on personal-service
16 contracts. I don't think that this is a personal-service
17 contract, and I'm inclined to agree with you that you have the
18 right to substitute.

19 But they're absolutely right on one point. You take by
20 way of assignments and substitution only what Compass had. And
21 if Compass has forfeited the servicing rights, you can't assign
22 them.

23 If they did not and if you took validly the assignment,
24 purchased, either subject to a lender's agreement or subject to
25 a sale agreement and a repurchase, either one, and you took

1 them validly, and Compass had them, you have full right I think
2 to substitute in for their servicers.

3 So my attitude is that I should grant you, of course, the
4 right to intervene, acknowledge the fact that you have assigned
5 servicing rights pursuant to either your foreclosure sale or
6 purchase, either way you may characterize it, and acknowledge
7 that you further assigned those to Asset Resolution, but
8 without approving the assignment because Piper is right in one
9 respect.

10 If Compass didn't have it to assign and/or you didn't have
11 it to assign at the time you did, you assigned nothing. What
12 that means in my mind, a little bit further delineation, is
13 your involvement at least as a lender was clearly acknowledged
14 by the bankruptcy court.

15 This Court has acknowledged Silar's -- when I say you, I
16 mean Silar's -- Silar's involvement throughout the case.
17 You've appeared here because you were named as a party. You
18 made appearance without representing a position on a number of
19 the motions through the course of the case.

20 So I think the assignment at least by way of collateral
21 interest if not in addition by way of purchase -- that remains
22 to be seen -- was acknowledged by the bankruptcy court, and it
23 was acknowledged by this Court. I don't think I would have any
24 basis to deny your right to substitute Silar in.

25 (Colloquy not on the record.)

1 THE COURT: That was acknowledged from the outset.
2 And, obviously, reading between the lines or even expressly,
3 the concern is that you're substituting in Asset Resolution as
4 a buffer.

5 If there are counterclaims for misservicing, malpractice,
6 breach of fiduciary duty during the term that Asset Resolution
7 is attempting to service these notes, that you're simply
8 introducing Asset Resolution as a buffer.

9 I don't think it's appropriate for me to approve that
10 scenario at this juncture until I hear the merits of the case,
11 when I hear the merits, so I think it's enough for me, my
12 present thinking, to acknowledge your assignment.

13 If there was no problem with what you got, Compass had it,
14 and there was no proper termination by other direct lenders,
15 Compass had it, then, certainly, Silar's foreclosure took the
16 servicing right.

17 But without going beyond simply acknowledging your
18 assignment to Asset Resolution, I don't think the Court can
19 approve that assignment or substitution. I can approve you as
20 -- Asset Resolution when I say you -- as a party under Rule
21 26 --

22 MS. SHUMENER: Um-h'm.

23 MR. ASHINOFF: 25(c), your Honor --

24 (Colloquy not on the record.)

25 MR. ASHINOFF: -- I think.

1 THE COURT: -- 25(c). You will be substituted in as
2 a party or as an additional party, certainly, in lieu of
3 Compass. The opposing parties want that at a minimum. They
4 need you as a defendant or a plaintiff --

5 MR. ASHINOFF: Right.

6 THE COURT: -- on the --

7 MR. ASHINOFF: Right.

8 THE COURT: -- ultimate judgment that they hope to
9 obtain --

10 MR. ASHINOFF: Right.

11 THE COURT: -- but without approving the substitution
12 into servicing rights.

13 Where does that leave you if I do it that way? They've
14 been allowed to be a party. They're here. They're heard.

15 You're acting. You've told everybody you're acting by
16 allowing them to handle note negotiations by way of your
17 assignment on the assumption that it was properly done.

18 (Colloquy not on the record.)

19 THE COURT: You're doing it also with the
20 understanding that you've named Windemere in accord with the
21 Court's mandate that you name a Nevada-licensed servicer.

22 MR. ASHINOFF: Um-h'm.

23 (Colloquy not on the record.)

24 THE COURT: That part of it is clearly acknowledged
25 and approved, but I cannot approve at this juncture the

1 substitution as service of Asset Resolution. All I can do is
2 acknowledge your appointment of them under the rights that you
3 suggest that you have and I pretty much agree with under the
4 documentation.

5 With respect to the preliminary injunction, that's a
6 different issue because I do need to consider whether the
7 preliminary injunction should extend to Asset Resolution as
8 well as Windemere and Silar.

9 MR. ASHINOFF: Your Honor --

10 (Colloquy not on the record.)

11 MR. ASHINOFF: Your Honor, you've said a lot, and
12 I've been listening as carefully as I can.

13 THE COURT: I'll let you respond.

14 MR. ASHINOFF: I'd like to pick pieces of this to
15 respond to. And if I'm not covering something on your mind,
16 I'd like --

17 THE COURT: Okay.

18 MR. ASHINOFF: -- the opportunity to have a little
19 bit of a dialogue.

20 THE COURT: Okay.

21 MR. ASHINOFF: Asset Resolution during the course of
22 this litigation is a special-purpose entity that was created to
23 foreclose on the rights that Silar had. In 35 years of
24 practice and Mr. Forstot's decades of practice, that's how
25 foreclosures are done, and the Court can take notes of that, so

1 Asset Resolution now owns as assignee through a foreclosure the
2 interest in the LSA contractual --

3 THE COURT: The assignment --

4 MR. ASHINOFF: -- servicing rights.

5 THE COURT: -- prior to foreclosure, of course,
6 however, did not occur nor was Asset Resolution created until
7 some short time ago --

8 MR. ASHINOFF: Yeah. But --

9 THE COURT: This last fall.

10 MR. ASHINOFF: But Asset Resolution is now for the
11 last six months doing all the work. It's servicing these
12 loans. It's servicing them extremely well.

13 And there's an uncontested record with declarations and
14 exhibits of the Internet site that's been set up, of the huge
15 efforts to communicate with lenders, of the huge efforts to
16 replace counsel or get better fees and counsel around the
17 country to get offers on the property. They're doing it --

18 THE COURT: And I think --

19 MR. ASHINOFF: They're --

20 THE COURT: -- I agree that if Compass passed you
21 something, you probably under the various agreements have the
22 right to assign someone like Asset Resolution to take the
23 foreclosure right.

24 MR. ASHINOFF: But here's the problem I have, and
25 here's the first point of concern that I have with where the

1 Court has this.

2 The Court on the basis of unproven, unsworn allegations is
3 not recognizing an actual commercial transfer of these rights
4 that has taken place in accordance with documents and
5 accordance with law. You're giving --

6 THE COURT: I'm acknowledging it.

7 MR. ASHINOFF: You're giving --

8 THE COURT: But I'm not approving it.

9 MR. ASHINOFF: But the problem is you have created --
10 and then I can go to the injunction, too, because the
11 injunction protects the person doing the servicing as well as
12 protecting the lenders, and the person doing --

13 THE COURT: Well --

14 MR. ASHINOFF: -- the servicing --

15 THE COURT: -- that's a good argument why the
16 preliminary injunction ought to be extended to Asset
17 Resolution.

18 MR. ASHINOFF: As the transferee of the interest from
19 Compass --

20 THE COURT: That's a separate problem.

21 MR. ASHINOFF: -- the Ninth Circuit and the
22 Eleventh Circuit have found that we stand in the shoes as the
23 Court said. Whatever contractual rights Compass had, we have.
24 What rights they didn't have, we don't have.

25 THE COURT: Well, what if the right was terminated?

1 MR. ASHINOFF: Well, the truth is, your Honor, that
2 the only purported termination of the right was ruled null and
3 void. And as we stand here on March 16th --

4 THE COURT: So why do we need a trial, then?

5 MR. ASHINOFF: Because there is a -- well, there are
6 a lot of issues to be tried.

7 THE COURT: You're saying --

8 MR. ASHINOFF: But that --

9 THE COURT: -- res judicata? We've already decided
10 that?

11 MR. ASHINOFF: No. I'm saying that the only attempt
12 at termination was null and void. Up to this date as we stand
13 here today, these rights have not been terminated. This Court
14 may make a ruling at trial that they should be, but they have
15 not been terminated, and we have unsworn allegations as to why
16 they should.

17 But you are taking away a property right that's protected
18 by an injunction on the basis of unsworn allegations. There
19 has never been a notice from 51 percent of the holders --

20 THE COURT: I don't see --

21 MR. ASHINOFF: -- on cause.

22 THE COURT: -- that I'm taking away a property right.

23 MR. ASHINOFF: The --

24 THE COURT: If I acknowledge --

25 MR. ASHINOFF: The --

1 THE COURT: -- and acknowledge --

2 MR. ASHINOFF: It's the right --

3 THE COURT: -- the fact that Asset -- allow them to
4 be a party, acknowledge the fact that they have received an
5 assignment from you, acknowledge the fact that they are
6 servicing, and even if I go a step further and extend the
7 protection of the preliminary injunction to them, then I don't
8 see how --

9 MR. ASHINOFF: Okay.

10 THE COURT: -- I've taken away --

11 MR. ASHINOFF: It --

12 THE COURT: -- a --

13 MR. ASHINOFF: That --

14 THE COURT: -- property right.

15 MR. ASHINOFF: It's the last part that I'm
16 addressing. They have a right under controlling federal
17 authority to get the protection of the injunction. That's the
18 property right I was talking about.

19 If your Honor extends the injunction and says I recognize
20 that Asset Resolution is now doing the job and carrying the
21 water every day, and I'm putting them in for Compass --

22 THE COURT: They have the right along with Windemere
23 to be the sole negotiator --

24 MR. ASHINOFF: Absolutely.

25 THE COURT: -- with a borrower.

1 MR. ASHINOFF: Absolutely.

2 THE COURT: That's the basic sum and substance of the
3 injunction.

4 MR. ASHINOFF: But that injunction -- and we've all
5 read it carefully, and we're trying to really live by it. That
6 injunction has to take in Asset Resolution in Compass' place,
7 instead, to fully protect the property rights pendente lite.
8 There's been nothing proven. There's no termination, yet.

9 THE COURT: Okay.

10 MR. ASHINOFF: We're entitled to that protection
11 pendente lite -- excuse me -- just as they are entitled to the
12 protection of the injunction that says that the disputed fees
13 don't go into your pocket. They go into a lockbox account.
14 They have a right to that even though we're the servicer.

15 But as servicer, we also have a right to the commensurate
16 protections that you afforded a servicer to get their advances
17 back, to get the servicing fees postconfirmation when a
18 property is sold.

19 Those are rights that they have that go with the property
20 under controlling Ninth Circuit and Eleventh Circuit authority,
21 so that's --

22 THE COURT: Okay.

23 MR. ASHINOFF: That's what I meant by the property
24 right. If your Honor grants the motion to put Asset Resolution
25 in the injunction in Compass' place, instead, because there's

1 been a transfer of interest, I'm fine with everything else the
2 Court is saying today, and that's really the nub of it --

3 THE COURT: Okay.

4 MR. ASHINOFF: -- because the truth is -- and I have
5 to underscore this -- as we stand here on March 16th, 2009,
6 there is no question that the servicing rights that Compass got
7 out of the bankruptcy and that have been assigned to Asset
8 Resolution as we stand here today have not been terminated.
9 That's why we're doing the job.

10 We're spending hundreds of thousands of dollars, putting
11 up money, sending people all over, putting employees to work.

12 Asset Resolution, by the way, is not a gossamer thread.
13 Asset Resolution is the single-largest direct lender in this
14 case. They have 5.8 percent of the direct loans. They have
15 substantial assets, I would suggest, more substantial assets
16 than most of the direct lenders.

17 They have been spending the money. They have been putting
18 their resources to work. They used an affiliate to help them
19 work and go out and service. With Windemere, they've put in
20 additional people to help deal with the brokers around the
21 country.

22 THE COURT: Okay.

23 MR. ASHINOFF: There's a lot of work going on here,
24 your Honor.

25 THE COURT: Very good.

1 Let me hear the motion to vacate preliminary injunction as
2 well as --

3 MR. ASHINOFF: And the --

4 THE COURT: -- the counter --

5 MR. ASHINOFF: All right. Do you --

6 THE COURT: -- or a response --

7 MR. ASHINOFF: Do you want to hear me --

8 THE COURT: -- to this motion.

9 MR. ASHINOFF: -- on the motion to vacate or just --

10 THE COURT: No. It's their motion. Let them present
11 it, and then I'll give you a chance to respond, please.

12 MR. ASHINOFF: Thank you.

13 (Colloquy not on the record.)

14 MS. SHUMENER: Your Honor, may I? Thank you.

15 (Colloquy not on the record.)

16 MS. SHUMENER: I will start with a confession and
17 then make a statement and welcome any corrections if I'm
18 mistaken.

19 I have scoured what I have of the bankruptcy court record,
20 and I have read the findings of fact and conclusions of law,
21 over 20 pages, the plan and the disclosure statement, and I
22 have not found one reference in there to the master repurchase
23 agreement between Silar and Compass.

24 THE COURT: You sure saw --

25 MS. SHUMENER: I'm --

1 THE COURT: -- a reference to a lender status for
2 Silar, right?

3 MS. SHUMENER: I --

4 THE COURT: Silar is financing this transaction.

5 MS. SHUMENER: I don't remember. See, I didn't see
6 it in the findings of fact and conclusions of law. I did not
7 see it in the 20-page findings of fact and conclusions of law.

8 THE COURT: With honest --

9 MS. SHUMENER: And --

10 THE COURT: -- due respect --

11 MS. SHUMENER: And --

12 THE COURT: -- and humble respect, that's selective
13 memory --

14 MS. SHUMENER: Okay.

15 THE COURT: -- because all the other pleadings here
16 represent -- and it's my recollection from pleadings long
17 since -- that the bankruptcy judge clearly understood that
18 Compass was being financed, and they were being financed by
19 Silar.

20 MS. SHUMENER: Maybe. And I'm not -- your Honor, I
21 started off saying I'm not saying I have a full-fledged
22 recollection. I just know that when it came to the master
23 repurchase agreement I don't think anybody saw it or had an
24 opportunity to object to it. That's number one.

25 Number two that I think is very, very important that I did

1 see from the bankruptcy court's records is that the bankruptcy
2 court wasn't just concerned with who was the highest bidder.

3 The bankruptcy court was absolutely concerned with
4 Compass' qualifications to act as a loan servicer and Compass'
5 representations to the Court that it had the wherewithal and
6 the ability and would make the advances necessary. Okay?

7 We have absolutely no evidence of any kind that Silar or
8 Asset Resolution have any qualifications to act as loan
9 servicer.

10 THE COURT: Why is that required?

11 MS. SHUMENER: Because a loan servicer has to have a
12 certain skill set and a certain reputation. They're handling a
13 half-a-billion dollars --

14 THE COURT: That's if --

15 MS. SHUMENER: -- in assets.

16 THE COURT: -- this is a personal-services contract,
17 of course.

18 MS. SHUMENER: This is a personal-services contract.

19 THE COURT: And you're going to argue that. But if
20 it's not --

21 MS. SHUMENER: Yeah.

22 THE COURT: And we're using a technical term, of
23 course. Personal-services contract means -- in the legal,
24 technical art, it means a contract whose obligations and
25 benefits cannot be assigned.

1 MS. SHUMENER: Correct.

2 (Colloquy not on the record.)

3 MS. SHUMENER: Well --

4 THE COURT: And we, in fact, have in the law and over
5 the course of many decades this very kind of contract being
6 assigned in normal commerce and in normal litigation.

7 MS. SHUMENER: Well, I don't know because I have not
8 seen such assignments, and I certainly haven't seen them when
9 the agreement doesn't call for such assignments, and I
10 certainly wouldn't say that it is common practice in the
11 industry or elsewhere that you have a power of attorney just
12 assigned as a matter of right. That you have a power of
13 attorney that --

14 THE COURT: The power of attorney --

15 MS. SHUMENER: -- which is inherent --

16 THE COURT: -- is a separate question in my mind.
17 But the assignment of servicing rights, you sat here very
18 patiently and listened to a number of cases.

19 We have a "plethora" -- excuse the term -- of such cases
20 filed in the federal courts now for the last several months and
21 into the indefinite future where parties, mortgagors on
22 homes --

23 MS. SHUMENER: Um-h'm.

24 THE COURT: -- are objecting to the assignment of the
25 servicing rights for their loans on their homes, and Courts

1 across the nation are saying that's not an issue.

2 There never has been an issue except in some of the
3 variations that are being raised now. It's not been an issue,
4 but what that servicing rights on my mortgage, on your mortgage
5 can be assigned.

6 MS. SHUMENER: Here's the material distinction
7 between those cases, your Honor. Those are objections being
8 made by the borrower where it's the party that owes money to
9 the servicer who's saying I don't like the invoice you're
10 sending me. I never approved you coming in; therefore, I don't
11 want to pay you.

12 We are the lenders in this case. It's our assets. It's
13 not a borrower who doesn't like getting an invoice from
14 company A versus company B. The difference here is it's our
15 half-a-billion dollars.

16 THE COURT: And what --

17 MS. SHUMENER: It's --

18 THE COURT: -- exactly --

19 MS. SHUMENER: You know --

20 THE COURT: -- is the Nevada case law that you're
21 relying on again?

22 MS. SHUMENER: Well, I'm relying on the -- well,
23 truly, I don't believe that we could find anything directly on
24 point other than out of the Tax Court which wasn't even Nevada,
25 so I would never represent to the Court --

1 THE COURT: Right.

2 MS. SHUMENER: -- that we have that.

3 THE COURT: So it's a Tax Court case.

4 MS. SHUMENER: It's a Tax Court case and other cases
5 that you could read together with the Tax Court case as to this
6 being a personal-services contract. But in addition to that,
7 the loan-servicing agreement itself has a power-of-attorney
8 provision within it.

9 THE COURT: Do you have any bankruptcy cases because
10 they deal with this issue all the time, and I'm sure --

11 MS. SHUMENER: I --

12 THE COURT: -- on appeal and, in fact, in this very
13 case the issue was never raised, but that this was not a
14 personal-services contract because it was assigned.

15 There was a ruling, of course, and the issue was raised
16 whether it not had to be cured and assumed and assigned. That
17 was a definite issue --

18 MS. SHUMENER: But I've got protection --

19 THE COURT: -- under bankruptcy law.

20 MS. SHUMENER: Oh.

21 THE COURT: But there was no issue raised -- and why
22 do we not have res judicata -- that these were
23 personal-services contracts, Judge, and, therefore, there can
24 be no assumption. There can be no assignment. You can't
25 assign, period, because they're personal-service contracts.

1 MS. SHUMENER: And I wasn't in the bankruptcy case,
2 your Honor. I apologize. I came onto the scene late, and I
3 admit it.

4 THE COURT: You don't need to apologize, but you do
5 need to answer.

6 MS. SHUMENER: The answer is that an assignment
7 blessed by a bankruptcy court especially when you have certain
8 nonassignability, certain prohibitions within bankruptcy law,
9 against --

10 THE COURT: Express.

11 MS. SHUMENER: -- nonassignability restrictions --

12 THE COURT: Right in the statute, Judge, you cannot
13 allow assignment of a personal-services contract.

14 MS. SHUMENER: But an assignment blessed in a
15 bankruptcy proceeding is different than saying and we bless all
16 subsequent assignments for time in memorial --

17 THE COURT: That's certainly true.

18 MS. SHUMENER: -- that go afterwards.

19 THE COURT: We --

20 MS. SHUMENER: And so --

21 THE COURT: That's certainly true.

22 MS. SHUMENER: Okay.

23 THE COURT: We know that if a contract says no
24 assignments except upon consent of one party or not one
25 assignment does equal a waiver as to all of them, but here --

1 MS. SHUMENER: Um-h'm.

2 (Colloquy not on the record.)

3 THE COURT: -- number one, I don't think we have that
4 language, and, number two and more importantly --

5 MS. SHUMENER: Um-h'm. We don't.

6 (Colloquy not on the record.)

7 THE COURT: -- that issue wasn't even raised
8 sufficient for there to be a waiver.

9 MS. SHUMENER: Ah, but the --

10 THE COURT: The question simply --

11 MS. SHUMENER: But whose burden?

12 THE COURT: -- was never raised, and isn't that
13 res judicata?

14 MS. SHUMENER: No. And I'll tell you why it's not
15 res judicata. Had Silar stepped up to the bankruptcy court and
16 said, here, Court, here is the master repurchase agreement, and
17 let's disclose its terms to all the direct lenders, and let's
18 have the bankruptcy court actually even be made aware of the
19 terms of the master repurchase agreement and the conditions
20 under which such an assignment could or could not take place,
21 that would be a different issue.

22 You could argue waiver. You could argue res judicata.
23 You could argue collateral estoppel.

24 THE COURT: You might --

25 MS. SHUMENER: But here --

1 THE COURT: -- have a point there, but let me give
2 you the devil's argument.

3 MS. SHUMENER: Yes, sir.

4 THE COURT: Assuming for the sake of argument that
5 you had a disclosure that Silar was financing it, and,
6 therefore, they were taking a collateralized interest.

7 MS. SHUMENER: Um-h'm.

8 THE COURT: Even though the purchase agreement,
9 repurchase agreement, was not disclosed --

10 MS. SHUMENER: Right.

11 THE COURT: -- you had disclosure of their taking of
12 a, quote, "property interest," a collateralized interest.

13 MS. SHUMENER: In what?

14 THE COURT: And nobody --

15 (Colloquy not on the record.)

16 THE COURT: In the servicing right.

17 MS. SHUMENER: Um-h'm.

18 THE COURT: Not only the direct-lender interests,
19 but, also, the servicing rights, everything that Compass was
20 receiving, and that would have been the time to raise a
21 question not only of assignment to Compass, but, also, of
22 reassignment to Silar.

23 MS. SHUMENER: Your Honor, I don't believe that there
24 was ever disclosure that there would be an assignment to
25 Silar --

1 THE COURT: Even --

2 MS. SHUMENER: -- of the servicing rights.

3 THE COURT: -- for collateralized purposes?

4 MS. SHUMENER: Even for collateralized purposes.

5 It's one thing to say --

6 THE COURT: Okay.

7 MS. SHUMENER: I think that the burden if -- if a
8 party is going to be burdened with the terms of an agreement,
9 it has to have those terms disclosed to it. And some hint or
10 generalized statement that this is being financed, financed to
11 what extent, under what conditions, by what?

12 Before I'm saddled with the terms of their private
13 agreement, I should be made aware of that agreement. I should
14 have a right to stand up and say, you know what, your Honor,
15 Compass came to this Court, to bankruptcy court, and proved
16 that it was a qualified loan servicer, and Compass came here
17 and gave you assurances, Judge, okay, that Compass would make
18 the advances, and Compass gave you the assurances that it would
19 abide by the terms of the agreement.

20 Of course, all of those things turned out to be false.
21 That we'll litigate later. Silar never did that. Asset
22 Resolution didn't even exist.

23 So to saddle us, you know, with the private agreement
24 because we knew that there was some financing that took place
25 in the background I don't is either res judicata or collateral

1 estoppel or a waiver of any sort.

2 THE COURT: I think that it turns on the disclosure
3 to the bankruptcy court. If the bankruptcy court was aware
4 that Silar was financing it --

5 MS. SHUMENER: Um-h'm.

6 THE COURT: -- and was aware that Silar was taking a
7 property interest, i.e., a collateral interest by a UCC and by
8 a collateralization agreement whether or not that agreement was
9 disclosed, then I think it's enough.

10 MS. SHUMENER: I'll go back and check, your Honor.

11 THE COURT: And it --

12 MS. SHUMENER: I'll --

13 THE COURT: -- bars your side. If your side did not
14 raise the personal-services-contract issue to the bankruptcy
15 court vis-a-vis Compass --

16 MS. SHUMENER: Um-h'm.

17 THE COURT: -- I think you're barred on that one.

18 MS. SHUMENER: Um-h'm.

19 THE COURT: And if you did not raise with that
20 sufficient a disclosure, if you did not raise the
21 personal-services contract with respect to Silar, I think
22 you're barred, also --

23 MS. SHUMENER: I --

24 THE COURT: -- not with respect --

25 MS. SHUMENER: I --

1 THE COURT: -- to --

2 MS. SHUMENER: I --

3 THE COURT: -- Asset Resolution. I agree on that.

4 MS. SHUMENER: I will personally go back and look at
5 the record. My associates have looked, and I --

6 THE COURT: Okay.

7 MS. SHUMENER: And I'm trying to -- I don't want to
8 burden the Court. I'm just trying to see if I hit --

9 THE COURT: That all --

10 MS. SHUMENER: -- some of the points.

11 THE COURT: That depends, of course, on whether this
12 is a personal-services contract.

13 MS. SHUMENER: Um-h'm.

14 THE COURT: And I do need to resolve that question.

15 (Colloquy not on the record.)

16 THE COURT: And do you have anything further on that?

17 MS. SHUMENER: On the personal-services contract,
18 other than what's been raised in the papers, honestly, I don't
19 really have that much to add --

20 THE COURT: Okay.

21 MS. SHUMENER: -- not anything.

22 THE COURT: Okay.

23 MS. SHUMENER: I would welcome any questions --

24 THE COURT: Okay.

25 MS. SHUMENER: -- or exchange.

1 THE COURT: My main questions to both sides are
2 what's the case law, what's the authority, what is it --

3 MS. SHUMENER: I'll look at our brief.

4 THE COURT: -- we are told about Nevada law.

5 MS. SHUMENER: I would like to be able to reply if
6 there is room.

7 THE COURT: Please.

8 MS. SHUMENER: Thank you, your Honor.

9 THE COURT: Other response, please, on the motion to
10 vacate preliminary injunction as well as response to
11 substitution.

12 (Colloquy not on the record.)

13 MS. RASMUSSEN: Thank you, your Honor.

14 THE COURT: Thank you.

15 MS. RASMUSSEN: Just to follow up where we left off
16 while it's fresh in my mind, I have gone through the bankruptcy
17 record as well, and there were no representations made to the
18 bankruptcy court with regard to the competency of Silar, that
19 they were taking an interest, that they were actually funding
20 it, that they were financing it. It was all Compass, Compass,
21 Compass.

22 THE COURT: What? Is Silar never even mentioned in
23 the record?

24 MS. RASMUSSEN: I can't tell you that Silar was never
25 mentioned because I have not gone through transcripts, but I've

1 gone through minutes. I've gone through pleadings. I can't
2 find anything that ever makes any representation to
3 Judge Riegle --

4 THE COURT: Exclusive of the transcripts.

5 MS. RASMUSSEN: -- but exclusive of the transcripts
6 because I've not gone through them.

7 THE COURT: Okay.

8 (Colloquy not on the record.)

9 MS. RASMUSSEN: And I don't have all of them. I'm
10 not even sure I would have the wherewithal, frankly, to read
11 them because it's been going on for so long.

12 But I can tell you this. There are no -- and I just
13 recently did this and submitted papers, and I can't even
14 remember which motion or document I attached it to, but I did
15 file it in this case. There are no UCC filings --

16 (Colloquy not on the record.)

17 MS. RASMUSSEN: -- with regard to Compass or Silar.

18 (Colloquy not on the record.)

19 MS. RASMUSSEN: So that would obviously be one of the
20 things that you would look at to see whether or not there's a
21 perfected interest of any kind.

22 Now, with regard to the motion for a preliminary
23 injunction, I get the impression from the comments of the Court
24 and the comments of Silar that the Court is inclined to simply
25 extend it to Asset Resolution.

1 THE COURT: I am inclined. I'll tell you why, and so
2 that you can respond and tell me why I shouldn't. I think I
3 ought to acknowledge Asset Resolution --

4 (Colloquy not on the record.)

5 THE COURT: -- without approving it because I think
6 that turns on the merits of the lawsuit, and I need to hear the
7 merits, but I think Rule 25 is a separate question from the
8 preliminary injunction.

9 A preliminary injunction is designed to hold the status
10 quo. It doesn't make sense to me before I hear the merits to
11 either shift the status quo in their favor or in your favor.

12 It doesn't make sense to me to say I'm going to substitute
13 in now over their objection unless they agree with it,
14 substitute now in their stead, a receiver before I have
15 determined whether or not they have a present interest in the
16 servicing rights.

17 It doesn't make any sense to me to approve Asset
18 Resolution as a substitute nor even Silar, of course, unless it
19 was acknowledged and represented to the bankruptcy court from
20 the very outset that Silar was a financier and taking a
21 property interest. Unless it was so represented, it doesn't
22 make any sense to me to approve them, either.

23 But the purpose of the preliminary injunction in this case
24 is to hold the status quo and to make sure that the interests
25 in the notes themselves don't evaporate because of this dispute

1 that's going on here.

2 That's the purpose of the preliminary injunction, to hold
3 the status quo to keep all the parties in the same posture
4 until the Court can decide in normal, slow, ordinary judicial
5 process the merits of the litigation.

6 My purpose is to hold the status quo and to make sure that
7 the positions of the parties don't shift forevermore and in
8 spite of the fact that I haven't yet decided the case.

9 MS. RASMUSSEN: Well, your Honor, okay. A couple of
10 things, and I'm just thinking of all the things that were said,
11 previously.

12 There was a valid termination of Compass' servicing
13 rights, so that leaves the Court, first of all, with the
14 preliminary threshold question of whether or not Asset
15 Resolution can take over servicing rights that have now been
16 terminated.

17 THE COURT: Right.

18 MS. RASMUSSEN: Obviously, that's a substantial
19 issue.

20 THE COURT: Are you asking me to answer that
21 question --

22 MS. RASMUSSEN: Well, I'm --

23 THE COURT: -- today?

24 MS. RASMUSSEN: I think that you have, but they state
25 that they weren't terminated.

1 THE COURT: Right.

2 MS. RASMUSSEN: And I understand that --

3 THE COURT: How have I answered --

4 MS. RASMUSSEN: -- that --

5 THE COURT: -- that question?

6 MS. RASMUSSEN: No. I'm sorry. I misspoke. They
7 assert, Silar asserts -- when I say they, I should say who they
8 are.

9 (Colloquy not on the record.)

10 MS. RASMUSSEN: Silar asserts that they have not been
11 terminated. And, of course, I believe that the record in this
12 court indicates that they have. But if the Court isn't willing
13 to go so far in the record as to say that, that's fine.

14 THE COURT: It seems to me to be very dangerous to
15 decide that question today before I've even heard the evidence
16 on the merits --

17 MS. RASMUSSEN: Okay.

18 THE COURT: -- or at least a summary judgment which I
19 have invited many, many times.

20 MS. RASMUSSEN: I won't disagree with your
21 hesitation. Okay.

22 Now, then the next issue is whether or not there was any
23 determination by the bankruptcy court that Silar had some
24 involvement or what about even the competency to service these
25 loans because all the representations which as Ms. Shumener

1 pointed out that were made in the bankruptcy court not only did
2 they turn out to be false, but they all had to do with Silar.

3 Silar went to Judge Riegle and said we have all of these
4 abilities and capabilities, and this is what we do or
5 Compass --

6 THE COURT: Okay.

7 MS. RASMUSSEN: -- went to --

8 THE COURT: You raise --

9 MS. RASMUSSEN: -- the bankruptcy court.

10 THE COURT: -- a good point. There is a provision in
11 the bankruptcy code that says, for example, on the right --
12 this is in a different provision than assignment.

13 It's adequate protection. You have a right to prime a
14 loan. You have a right to bump a person's constitutional
15 property interests as long as you give adequate protection.

16 There are other similar provisions in other places where,
17 basically, congress is making the decision, Judge, if you can
18 say that their property right is protected, you can change or
19 bump them.

20 (Colloquy not on the record.)

21 THE COURT: And one of the provisions has to do with
22 substitution of obligors. So, for example, if you want to say,
23 Judge, this encumbrance covers both houses, you as a debtor,
24 but we want you to divide it in two, so that there's only an
25 encumbrance -- there's separate encumbrances -- and, by the

1 way, we have a sale of one, so we want you to approve that sale
2 even though we're not paying off the whole encumbrance, the
3 judge can do that if there's adequate protection of the
4 property interest.

5 Also, you can substitute a borrower if you can show,
6 appropriately, for example, the right to use cash collateral.
7 If you can say to the Court they're going to be adequately
8 protected because this substituted party has the same
9 creditworthiness, the same ability to answer the contract,
10 those provisions are present, too.

11 And they are provisions that have constitutional
12 parameters. That's why they're put there because, otherwise,
13 you'd be taking away a property interest.

14 MS. RASMUSSEN: Right.

15 THE COURT: So what I'm saying is you do, however,
16 have to ask for that showing. If you don't object -- now, all
17 of this assumes, number one, that this is a personal-services
18 contract, not a legal term of art, and, number two, that there
19 was a disclosure that Silar is going to finance, and Silar will
20 be taking a property interest.

21 It seems to me that bar applies if nobody on the other
22 side raised the question show us that they're equally credit
23 worthy, equally capable of servicing.

24 MS. RASMUSSEN: Well, okay. I think the answer to
25 your question is in the bankruptcy proceedings there was no

1 basis to raise the question because it was never presumed or
2 even assumed that Silar would end up here where we are today
3 servicing loans, so I don't think that they could be barred --

4 THE COURT: That seems to me --

5 MS. RASMUSSEN: -- from --

6 THE COURT: -- like a factual question.

7 MS. RASMUSSEN: Okay.

8 THE COURT: And both sides need to demonstrate to
9 me --

10 MS. RASMUSSEN: But --

11 THE COURT: -- the absence or a presence --

12 MS. RASMUSSEN: And with regard --

13 THE COURT: -- of it.

14 MS. RASMUSSEN: -- to the personal-service contract,
15 I substantially briefed that in the motion to vacate
16 preliminary injunction, and I will let --

17 THE COURT: What Nevada law are you relying on to
18 tell me that these contracts are personal-service contracts?

19 MS. RASMUSSEN: Your Honor, I cited several NRS
20 cases, and I apologize. I don't have the motion in front of
21 me, but it is in my -- I did address the issue in the motion to
22 vacate.

23 THE COURT: Okay.

24 MS. RASMUSSEN: I cited statutory law --

25 THE COURT: I'll simply address those --

1 MS. RASMUSSEN: -- and cases.

2 THE COURT: -- then in my written response.

3 MS. RASMUSSEN: Okay. And, now, let me talk about
4 what the Court was alluding to which was protection. I
5 disagree with the Court that the purpose of the preliminary
6 injunction is to maintain a status quo, and I disagree more
7 that that has been the operative effect in this case.

8 It appears -- and I think it's fairly well-substantiated
9 by the way things have played out -- that the operative effect
10 of the preliminary injunction which is issued quite some time
11 ago now is that it has been, in effect, a prejudgment writ of
12 attachment and rather than a preliminary injunction to protect
13 the rights of the parties.

14 THE COURT: How did it attach anything? What
15 actually transferred these servicing rights was a sale order, a
16 sale order now by the way I remind you that's final. It was
17 initially appealed. It was appealed to this court. It was
18 appealed to the circuit. The appeal was withdrawn.

19 (Colloquy not on the record.)

20 THE COURT: That sale is final. In other words, the
21 transfer of rights here at least to Compass occurred by virtue
22 of a sale, not by virtue of a prejudgment writ of attachment or
23 anything like it.

24 MS. RASMUSSEN: Right. But what is at -- the
25 servicing rights are at issue, not the loans themselves, and so

1 the preliminary injunction, the impact that it has, is it has
2 prevented, for example, all of the direct lenders from
3 organizing, so that they can litigate against Silar. It has
4 basically seized their entire property right.

5 Now, even more problematic than that --

6 THE COURT: I'm just --

7 MS. RASMUSSEN: -- is that --

8 THE COURT: I'm just having real trouble with that
9 argument. Preliminary injunction didn't do that at all. In
10 fact, I have frequently invited the parties back.

11 I gave them the leave to ask on an emergency-motion basis
12 the right to ask for a hearing to terminate servicing rights
13 with respect to any particular loan.

14 What does that that you've just cited that hinders their
15 organization was my separate order that Ms. Cangelosi and
16 Loan Protection, LP, had to retransfer solicited rights which
17 they were representing were properly solicited.

18 They were the assignments of rights, something that looked
19 to me totally like a security interest. They were given back
20 in exchange for assignment of a property interest a profit
21 percentage or representation.

22 And in addition, what concerned me was that they seemed to
23 take the position -- Ms. Cangelosi took the position -- that
24 her representation bound all direct lenders in each respective
25 note.

1 MS. RASMUSSEN: Well, your --

2 THE COURT: That is she had the right because of that
3 assignment to further assign or to handle or take down by way
4 of servicing fees as though she stood in the place of the
5 servicer. She was the servicer.

6 And I found that to be totally defective, and I ordered
7 her to return it. That's what caused the impairment that
8 you're citing now, not the preliminary injunction.

9 MS. RASMUSSEN: Okay, your Honor. I disagree with
10 the Court's characterization with all due respect as to the
11 characterization that there was a security or a securities
12 violation.

13 THE COURT: Sure.

14 MS. RASMUSSEN: Clearly, people would have a right,
15 and that's why, you know, I disagree with that order, but I'm
16 here to talk about the preliminary injunction. Clearly, people
17 have a right to pledge a portion of their property interests
18 for the purpose of litigating and organizing, and so I disagree
19 with that order.

20 But on a more fundamental level, the two orders work in
21 conjunction with one another, so what these people had done as
22 direct lenders was organize, and they had, for example, loan
23 captains for each loan. They had an LLC for each loan, so that
24 they could exercise their right to termination. That's why
25 we're here.

1 Now here we are a year and a half later, and the Court is
2 telling them they haven't validly terminated or Silar is
3 saying, well, you haven't validly terminated, so we're going to
4 keep assigning.

5 It is the ongoing harm is just magnified every month that
6 we go, and then, of course, it's further exacerbated by the
7 market which isn't anyone's fault. It is what it is.

8 (Colloquy not on the record.)

9 MS. RASMUSSEN: But the effect of the preliminary
10 injunction and the other order together have been catastrophic
11 to the direct lenders. I don't think there's any dispute about
12 that.

13 So all that the preliminary injunction did was protect
14 Compass who has failed. They have miserably failed all of the
15 direct lenders.

16 The representations as it turns out were inaccurate, and
17 now Silar is saying, oh, well, we financed them. We want the
18 preliminary injunction to extend to us. The preliminary
19 injunction -- and I'll address one of the issues that the
20 Court --

21 THE COURT: What is the effect of terminating the
22 preliminary injunction? It just allows you now?

23 MS. RASMUSSEN: It would allow people to service
24 their own loans. This is a contract dispute.

25 THE COURT: Wow.

1 MS. RASMUSSEN: They can sue the direct -- well --
2 (Colloquy not on the record.)

3 MS. RASMUSSEN: Well, your Honor, they are perfectly
4 capable of servicing their own loans. Silar can certainly sue
5 over the disputed fees, and Silar could ask for a specific form
6 of relief --

7 THE COURT: So --

8 MS. RASMUSSEN: -- that it feels --

9 THE COURT: -- basically --

10 MS. RASMUSSEN: -- will protect its interest.

11 THE COURT: -- I'm just saying chaos. Take it to
12 another Court.

13 MS. RASMUSSEN: I don't think you're saying take it
14 to another Court at all. Silar ultimately believes it has a
15 right to earn money and to service. That's what's at issue, so
16 the --

17 THE COURT: It is. It's been addressed to my
18 jurisdiction, something I'm obligated to answer.

19 MS. RASMUSSEN: But anything that the bankruptcy
20 court ruled on was Compass, and now Silar is saying now that's
21 our right, so why are the people, why are the direct lenders,
22 frozen in time while Silar gets to continue with, really, for
23 lack of a better word "raping" these people.

24 I mean, there are disputes over every single thing that
25 happens which brings me to the protection issue. You know, the

1 Court touched on it.

2 You know, most (indiscernible) transfer or do almost
3 anything if there are adequate protections. There's no bond on
4 this preliminary injunction, so I disagree that it should be
5 extended to Silar. I certainly disagree that it should be
6 extended to Asset Resolution.

7 But having said all of that, if the Court is going to
8 disagree with me, I need to address the bond issue. The bond,
9 there is none, and the whole purpose of having a bond is to
10 protect those who are restrained by the preliminary injunction.

11 THE COURT: And what would be --

12 MS. RASMUSSEN: The federal rules require it.

13 THE COURT: -- their potential damage?

14 (Thereupon, Michele Phelps concluded as transcriber,
15 and Lisa L. Cline commenced as transcriber
16 at 12:30:18 p.m.)

17 MS. RASMUSSEN: Your Honor, I would submit that this
18 Court would need to require a bond of at least \$50,000,000, and
19 let me --

20 THE COURT: Um-h'm.

21 MS. RASMUSSEN: -- give you some examples of why.
22 Gardens Timeshare, there is a 3.6-million-dollar dispute.
23 Mountain House, there is a \$12,000,000 dispute.
24 Bar --

25 THE COURT: Now, let me slow you down a little bit.

1 There's a 3.6-million-dollar dispute. Is the dispute over
2 default-interest rate and fees?

3 MS. RASMUSSEN: Compass alleged that they had equal
4 shares to the direct lenders in that particular loan.

5 THE COURT: And --

6 MS. RASMUSSEN: That's --

7 THE COURT: And, therefore, the dispute is over the
8 fees that Compass and/or Silar has the right --

9 MS. RASMUSSEN: And if Silar --

10 THE COURT: -- to collect.

11 MS. RASMUSSEN: -- is saying they take what Compass
12 had, that obviously is now a Silar dispute.

13 THE COURT: So where are those fees right now?

14 MS. RASMUSSEN: I don't know, and that's the other
15 thing I need to tell you when last time I've --

16 THE COURT: Well, then you do need to tell me where
17 they are because that's part of your obligation to tell me --

18 MS. RASMUSSEN: Well --

19 THE COURT: -- the harm.

20 If you're telling me that 3.6 is the potential loss, my
21 question was where are the fees, and I'm assuming unless you
22 tell me otherwise that they're with Silar.

23 MS. RASMUSSEN: I'm assuming that they're with Silar,
24 too, and I'm also assuming --

25 THE COURT: And if you prevail in the litigation, and

1 we never should have entered an injunction to aid in their
2 continued, quote, unquote, "ownership of the servicing rights,"
3 how have you been harmed? They get a judgment against them,
4 pay the three-six million to the direct lenders.

5 MS. RASMUSSEN: Well, your Honor, the Federal Rules
6 of Civil Procedures, quite simply, require a bond. How it got
7 issued before -- I wasn't here -- without a bond I don't know,
8 but the Court is required to set a bond, so now the issue is
9 what amount.

10 THE COURT: Okay.

11 MS. RASMUSSEN: Okay. So --

12 THE COURT: 1,000 bucks.

13 MS. RASMUSSEN: No, your Honor. I'm submitting --

14 THE COURT: What's --

15 MS. RASMUSSEN: -- to you that it should be
16 50,000,000 --

17 THE COURT: And why?

18 MS. RASMUSSEN: -- because the whole purpose of the
19 -- because the preliminary injunction, first of all, is not
20 warranted. This is --

21 THE COURT: You --

22 MS. RASMUSSEN: -- a contract dispute.

23 THE COURT: You cited 3.6 million first.

24 MS. RASMUSSEN: Okay.

25 THE COURT: And I told you that --

1 MS. RASMUSSEN: Than I've got --

2 THE COURT: That I don't see that as a potential
3 harm.

4 MS. RASMUSSEN: Then I --

5 THE COURT: They've got --

6 MS. RASMUSSEN: -- have 12.

7 THE COURT: -- the money if they have it at all. If
8 it exits anywhere, they've got it. The preliminary injunction
9 orders them to segregate it. And if we ultimately rule in your
10 favor, you get it. Where have you been harmed?

11 MS. RASMUSSEN: Could I continue with the amounts,
12 your Honor?

13 THE COURT: Sure.

14 MS. RASMUSSEN: Okay.

15 (Colloquy not on the record.)

16 MS. RASMUSSEN: Mountain House, 12,000,000, Silar or
17 Compass failed to bring forward an offer for a partial
18 paydown.

19 Bar-USA, 5,000,000, failure to bring an offer to the
20 direct lenders which resulted in \$5,000,000 less to the direct
21 lenders.

22 60th Street Venture, 3.7 million, failure to take
23 appropriate servicing actions to protect collateral.

24 Bay Pompano and Palm Harbor, 6,000,000, released
25 collateral in exchange for no payments.

1 Brookmere, 6,000,000, Compass abandoned the loan and have
2 refused to turn over the file.

3 Foxhills/Eagle, 65,000,000 -- this is a \$65,000,000
4 loan -- full principal and interest payoff offer made in
5 April 2007. Now it's in foreclosure and all sorts of problems.
6 Nothing's happened with that \$65,000,000 loan.

7 Gramercy/Gess, 20,000,000, total and complete
8 mismanagement of income-producing properties.

9 Lerin Hills, 9.6 million, Compass crashed for -- they
10 basically disobeyed the court order and sabotaged a payoff of
11 9.6 million by refusing to accept anything less than
12 17,000,000.

13 That was because they wanted to keep 8,000,000 for
14 themselves, so there was a 9.6-million-dollar offer. They
15 refused to accept less than 17,000,000, 8 of which would have
16 gone to them.

17 And this doesn't include all of the loans where nothing's
18 been done to service them. This is why I say a bond is
19 required.

20 Now, you presume that somehow Silar or Asset Resolution
21 who by the way is a shell company that they just recently set
22 up would have assets to pay these damages, but that's an
23 erroneous presumption on the Court's part I believe.

24 And no one's made any promise to you that there would be
25 any assets available to pay anything near these types of

1 damages. No. These are the things that are at issue. That's
2 why a bond is required.

3 THE COURT: I'll state for the record I have made no
4 such presumption, but --

5 MS. RASMUSSEN: Okay. But you are saying you -- so
6 what you just said to me is if you get a judgment, then don't
7 you just go collect from Silar.

8 Well, I mean, I just objected a few minutes ago to the
9 Gramercy proceeds being distributed without at least an
10 accounting, and Silar's not willing to agree that we would
11 escrow, you know, 1.2 million or something.

12 So I don't know why there would be any presumption on the
13 part of Silar that they would be judgment-worthy, and that a
14 bond should not be required. A bond most certainly should be
15 required.

16 And even if this were a prejudgment writ of attachment as
17 I have also characterized, a bond would be required there, in
18 fact, a bond in twice the amount of potential damages.

19 So when you prevent people from doing what they ought to
20 be able to do which was that they believe they have terminated
21 Compass and service their own loans, their hands are tied
22 behind their back.

23 They can't even coordinate amongst themselves and find an
24 organized fashion to litigate because of the other order
25 involving Ms. Cangelosi. Here they are completely at the mercy

1 of Silar, and there's no bond. It just would be completely
2 improper.

3 And I don't believe that there is a basis for the Court to
4 issue a preliminary injunction in this case, anyway, because
5 it's a contract dispute.

6 Now, certainly, they could make whatever requests they
7 wanted for some kind of security if they think that their
8 interests are at risk, but a preliminary injunction isn't the
9 necessary remedy for that, and I --

10 (Colloquy not on the record.)

11 MS. RASMUSSEN: And I would leave the Court with the
12 case. It's Desarrollo, D-e-s-a-r-r-o, double l, -o, versus
13 Alliance. It's a U.S. Supreme Court case, 527 U.S. 308, 1999.

14 (Colloquy not on the record.)

15 MS. RASMUSSEN: And I think that that Court best
16 addresses the circumstance here. This is a contract-dispute
17 case. It's not the type of case where equitable relief in the
18 form of a preliminary injunction is warranted. Okay?

19 THE COURT: Thank you.

20 MS. RASMUSSEN: Thank you.

21 Counsel, I'm allowing you to appear here. Of course, we
22 do need to resolve a question about your pro hac vice
23 application. We'll do it at today's hearing. But for purposes
24 of this motion, I'm allowing you to state the position.

25 MR. COLLINS: All right.

1 (Colloquy not on the record.)

2 MR. COLLINS: Your Honor, Michael Collins on behalf
3 of the Jones Vargas direct lenders. We agree with the Court
4 that the motion to substitute could be granted under 25(c)
5 where they can prosecute and defend claims and defenses in this
6 action without prejudice to the positions of all the parties on
7 the merits, so we agree that is the proper approach.

8 With respect to the --

9 THE COURT: Without simply approving it.

10 MR. COLLINS: Right. Absolutely, your Honor.

11 THE COURT: Um-h'm.

12 MR. COLLINS: Absolutely. We think that is the
13 proper way to do that, so everything can be in your court.

14 (Colloquy not on the record.)

15 MR. COLLINS: And we can get this resolved one way
16 or the other either consensually or litigated at a final
17 trial.

18 Two, your Honor, with respect to the motion to dissolve
19 injunction, my firm did not file that motion. We agree on the
20 bond, your Honor, although we may want to create a separate
21 record based on evidence to present to you on why a bond is
22 appropriate.

23 So we're not joining in this particular motion, although
24 we want to, you know, not lay behind the law, and we may tell
25 you --

1 THE COURT: I think --

2 MR. COLLINS: -- your Honor --

3 THE COURT: -- a request for a record is very
4 appropriate and is, in fact, a necessity to request a bond of a
5 substantial size.

6 (Colloquy not on the record.)

7 MR. COLLINS: Right, your Honor. So our firm on
8 behalf of our clients may do that.

9 THE COURT: Okay.

10 MR. COLLINS: Thank you.

11 THE COURT: Please.

12 MR. ASHINOFF: Thank you.

13 (Colloquy not on the record.)

14 MR. ASHINOFF: May it please the Court, I have a fair
15 bit to say. Your Honor asked for citations and authorities and
16 law and record cites, and I intend to provide it on every
17 point.

18 Ms. Rasmussen represented to the Court that there was no
19 UCC filed with respect to these rights that were secured for
20 Silar.

21 Exhibit D to the Curcio affidavit on the motion to
22 substitute, Exhibit D, Document 9095, is, in fact, the UCC
23 file. Ms. Rasmussen misrepresented the record to the Court.

24 There's been a representation that there's no record here
25 for the injunction. Your Honor found in sanctioning the

1 Cangelosi lenders who Ms. Rasmussen represents, "That even
2 prior to the closing of the sale and before Compass assumed the
3 role of loan servicer Cangelosi and the LPG began looking for
4 ways to terminate Compass and to retain a loan servicer willing
5 to waive the fees conveyed to Compass pursuant to the APA,"
6 paragraph 11 of your contempt order, your Honor.

7 This is going on today. It goes on every hearing. Every
8 order you issue states that there are protectable property
9 rights here, and you're going to have a full and fair
10 litigation with discovery, a hearing, and a trial. We welcome
11 that.

12 But every time a motion comes up, they want to relitigate
13 and try to strip away my clients' contractual protected rights
14 with no hearing, with no presentation of evidence, with no
15 record, and with no finding of wrongdoing.

16 And they're asking to do that again today by stripping
17 away an injunction which the Court found necessary to enter
18 after three or four days full of hearings where any of these
19 allegations could have been raised, where any of these
20 horrendous things could have been raised, or a request for a
21 \$50,000,000 bond could have been raised, but they weren't.
22 They weren't.

23 You can't keep relitigating on every motion everything
24 that came before because you don't like what came before. You
25 can't do that.

1 There is a finality to the confirmation and sale order.
2 There is a finality to their right to appeal and keep arguing
3 against a preliminary-injunction order. There is a finality to
4 this Court's July 11th order, and I want to go to each of them.

5 And that, respectfully, the lenders don't respect the
6 finality of this Court's orders. They don't respect the rules
7 that the Court has set out which parties are supposed to follow
8 until this case is over.

9 And we would request that those rules be enforced, that
10 they be respected, and that they be set in place, so that the
11 parties can go about the business of litigating over whether
12 there is any grounds to terminate the servicing and what the
13 waterfall rights are.

14 That's the only complaint that's been filed in this case,
15 and the complaint is the second amended complaint filed by some
16 of the lenders, and that complaint says Silar is the owner of
17 the rights.

18 So if their complaint and pleading is saying Silar is the
19 owner of the rights, how can they all get up today and tell you
20 Silar doesn't really have a right to the rights? They are
21 estopped by their own pleadings.

22 Paragraph 14 of the confirmation order, the bankruptcy
23 sale, the 363 sale -- and we quote it in our reply brief,
24 your Honor -- paragraph 14 said, "The acquired assets" -- and
25 that's the contractual servicing rights.

1 "The acquired assets shall be transferred to the asset
2 purchaser on the terms and conditions set forth in the asset
3 purchase agreement and upon closing shall be free and clear of
4 all liens, claims, interests, obligation, and encumbrances
5 whatsoever, including but not limited to, C, all encumbrances
6 of any kind or nature, including but not limited to any
7 restriction on the transfer or other exercise of the attributes
8 of ownership."

9 (Colloquy not on the record.)

10 MR. ASHINOFF: The bankruptcy court order was a final
11 sale of these rights. It sold --

12 THE COURT: I agree with you.

13 MR. ASHINOFF: -- these rights.

14 THE COURT: But counsel said that transfer approved
15 without including any limitation on the right to transfer was
16 as to Compass.

17 MS. SHUMENER: Um-h'm.

18 MR. ASHINOFF: Your --

19 (Colloquy not on the record.)

20 MR. ASHINOFF: Your Honor, it says Compass' -- it
21 says "of any right to transfer or exercise any attributes of
22 ownership". The contractual rights to transfer them were
23 protected by paragraph 14 --

24 THE COURT: That didn't say --

25 MR. ASHINOFF: -- free and clear --

1 THE COURT: -- into the forever future.

2 (Colloquy not on the record.)

3 MR. ASHINOFF: -- free and clear of any encumbrances.
4 Certainly, your ability to transfer it to your secured party is
5 one heck of an encumbrance, your Honor. The fact is my clients
6 and Compass --

7 THE COURT: Your argument, it just doesn't make sense
8 to me, and I'll tell you why. The judge in other places said
9 I'm not changing these contract rights at all.

10 MS. SHUMENER: Um-h'm. Um-h'm.

11 THE COURT: I'm not altering them.

12 MR. ASHINOFF: But let's look at the --

13 THE COURT: So she clearly had the right, and what
14 she did there in that language is in spite of any limitation on
15 a right to transfer, for example, like that these are
16 personal-service contracts or specific express language in the
17 LSAs, in spite of any such language, I'm transferring these
18 rights to Compass.

19 Now, there was also I would agree with you a transfer to
20 Silar. If you represented to the Court somewhere in those
21 proceedings that Silar was financing and taking a property
22 interest, then I think that language covers Silar, too, not
23 necessarily Asset Resolution, but that language is only a
24 one-time.

25 MR. ASHINOFF: Your Honor --

1 THE COURT: It doesn't say that the contract rights
2 are altered forever into the future to waive any limitation on
3 assignment.

4 MR. ASHINOFF: Your Honor, with due respect -- and
5 it's hard to do this verbally when you're looking at a
6 clause.

7 THE COURT: You read to me the language. Read it
8 again, then.

9 MR. ASHINOFF: It says, "Free and clear of" -- it's
10 going to be transferred to Compass "free and clear of any
11 obligations and encumbrances whatsoever, including but not
12 limited to the encumbrance and any restriction on the right to
13 transfer those rights." There's no restriction allowed on the
14 right --

15 THE COURT: Where is --

16 MR. ASHINOFF: -- to transfer it.

17 THE COURT: -- that language inconsistent with the
18 interpretation I just gave?

19 MR. ASHINOFF: But the right to transfer the rights
20 is what enabled Silar to foreclose on that property. That's
21 why I'm here because the secured lender --

22 THE COURT: You give me --

23 MR. ASHINOFF: -- paid --

24 THE COURT: -- absolutely no reason to translate the
25 language any way other than that I just gave it.

1 MR. ASHINOFF: Is your Honor saying that if I said
2 Silar has the rights, so we'll take them back, that's fine?
3 But if we use Asset Resolution to foreclose which is the way
4 it's done in this country --

5 THE COURT: I didn't say that at all. What I said
6 was in that order the binding res judicata effect of that order
7 is an approval of a one-time assignment, including an
8 assignment to Silar if that was disclosed to the bankruptcy
9 court by way of encumbrance. That was a one-time approval of
10 waiver of any encumbrance or other restriction on assignment.

11 If you have the right under the normal terms of these LSAs
12 to assignment, not only to Silar, but to Asset Resolution, to
13 anybody else, you've got that right.

14 Judge Riegle didn't change that right, but she told us
15 expressly she was not altering these contracts at all. She did
16 tell us, however, in that order regardless of any encumbrance,
17 for example, if not Compass, but USA Commercial has already
18 encumbered the servicing rights, and there is an encumbrancy
19 out there, ABC American Bank, that has the first right and the
20 right to prevent them from further assigning or even assigning
21 a secondary interest she is nevertheless approving the
22 assignment in spite of that encumbrance.

23 She is also telling us that in spite of any restriction on
24 the language of assignment expressly in the LSAs or in the
25 deeds of trust and in spite of any restriction under the common

1 law, including the personal-services contract --

2 MR. ASHINOFF: Or a fiduciary-duty objection.

3 THE COURT: -- objection which was never made --

4 MR. ASHINOFF: Right.

5 THE COURT: -- nevertheless, the assignment is
6 improved, and it's free and clear.

7 She is not telling us -- and you have given me no reason
8 to construe that language -- as a revision to the contract --
9 (Colloquy not on the record.)

10 THE COURT: -- deleting any other limitations
11 otherwise existing on further assignments.

12 MR. ASHINOFF: Your Honor, I want to move on. But
13 with due respect --

14 THE COURT: Okay.

15 MR. ASHINOFF: -- I think when you read
16 subparagraph C the only way that you can read subparagraph C
17 and its reference to any further encumbrances on restriction on
18 the use or a transfer is to look prospectively to a future
19 transfer.

20 THE COURT: Okay. You made your point.

21 MR. ASHINOFF: I --

22 THE COURT: You've read it twice. I'm willing to
23 listen to you read it --

24 MR. ASHINOFF: No. I --

25 THE COURT: -- several more times.

1 MR. ASHINOFF: I want to move on. I want --

2 THE COURT: That's --

3 MR. ASHINOFF: -- to move on.

4 THE COURT: -- my ruling.

5 MR. ASHINOFF: The sale was over dozens of objections
6 from various lenders. There was not a single objection that
7 the LSAs were fiduciary obligations that couldn't be assigned
8 without the consent of every lender.

9 (Colloquy not on the record.)

10 MR. ASHINOFF: There was not a single objection that
11 they were personal-service contracts even though all the
12 lenders were parties. They had their own committee. They
13 appeared --

14 THE COURT: I think I agree with you --

15 MR. ASHINOFF: -- individually.

16 THE COURT: -- on that.

17 MR. ASHINOFF: The --

18 THE COURT: If, in fact, the assignment to Compass
19 was disclosed -- it was. If, in fact, the assignment even
20 though not in a detailed-agreement form was disclosed to Silar,
21 then I think I agree with you.

22 MR. ASHINOFF: What was disclosed --

23 THE COURT: There's probably a bar, res judicata
24 effect.

25 MR. ASHINOFF: Yeah. And there was nothing in there.

1 There was no objection that the extra powers of attorney beyond
2 the LSAs had expired because the loans had matured at the
3 time --

4 THE COURT: Now --

5 MR. ASHINOFF: -- of the bankruptcy --

6 THE COURT: -- that I have a little bit more of a
7 difficulty.

8 MR. ASHINOFF: Well --

9 (Colloquy not on the record.)

10 THE COURT: On the last points, I agree with you, and
11 I'm ready to so rule subject to either side's ability to move
12 for reconsideration and show me the actual record where there
13 was no disclosure.

14 (Colloquy not on the record.)

15 MR. ASHINOFF: There --

16 THE COURT: Subject to that, I'm willing to so rule.

17 MR. ASHINOFF: The --

18 THE COURT: The question, however, on --

19 MR. ASHINOFF: Can I make --

20 THE COURT: -- powers of attorney is a different
21 question.

22 MR. ASHINOFF: Yeah. Can I address it?

23 THE COURT: The powers of attorney -- servicing
24 rights and power of attorney really are two different things.
25 Some of the servicing rights may be supported by the power of

1 attorney, and you can withdraw a power of attorney.

2 I'm not sure whether you have the right once it's been
3 granted in a servicing context, for example, a power of
4 attorney to negotiate, to settle, to provide a substitute
5 agreement for, to extend the note, to take a partial payment of
6 the notes.

7 There is all kinds of things that a servicer needs power
8 to do, and the power of attorney, of course, is to support
9 those powers.

10 A servicer also just needs the ability to collect. It
11 doesn't need a power of attorney for that purpose. It can
12 receive the funds pursuant to its right originally granted by
13 way of designation as a servicer. It doesn't have to have a
14 power of attorney.

15 But there are other rights that it needs a power of
16 attorney for, and there that seems to me to be a different
17 question.

18 MR. ASHINOFF: And --

19 THE COURT: In other words, does a single direct
20 lender apart from the whole note have the right to terminate a
21 power of attorney to a servicer that had been previously given,
22 in fact, a note which the servicer itself had sold to the
23 direct lenders by way of brokerage?

24 Does a single lender have the right to withdraw power of
25 attorney in that circumstance, for example, a power of attorney

1 to negotiate and settle, or is that really an irrevocable
2 power?

3 MR. ASHINOFF: Can I address that, your Honor,
4 because I have a number of responses, but the sum and substance
5 of them is that the separate powers of attorney are a total red
6 herring here, and I'll explain why.

7 First of all -- and I'll go sequentially -- at the time
8 that the confirmation order was entered and the sale was done,
9 43 of the 60 loans were already in default, so they had
10 matured. They had already matured.

11 Not one lender at any point got up and said, wait a
12 minute, you can't assign these servicing rights because the
13 loan is in maturity and the power expired. They waived that.

14 43 of the loans had matured, and they sat there silent.
15 Why? Because they were getting \$67,000,000, but that doesn't
16 help them now.

17 They had no problem taking \$67,000,000 knowing that
18 Compass was going to pay it, and that it had a financier who
19 was lending. They knew --

20 THE COURT: I agree --

21 MR. ASHINOFF: -- that there was --

22 THE COURT: -- with part of that.

23 MR. ASHINOFF: I --

24 THE COURT: And I'll tell you the part I don't agree
25 with. Number one, it's 8,000,000 for the servicing rights.

1 MR. ASHINOFF: Your Honor, that's more complicated,
2 and I --

3 THE COURT: There's no --

4 MR. ASHINOFF: I don't want to go --

5 THE COURT: -- power-of-attorney issue involved at
6 all in your purchase of the direct-lender rights, so it's just
7 the money that you paid for the servicing rights.

8 MR. ASHINOFF: There --

9 THE COURT: And I partially agree with you that
10 there's even a bar effect on the failure to raise the
11 power-of-attorney issue at that point, but only to this extent.

12 Nobody objected. Although it wasn't express, what was
13 express was a transfer of the servicing rights. Nobody really
14 raised the issue of by the way, Judge, we're also transferring
15 the powers of attorney.

16 MR. ASHINOFF: We didn't need the --

17 THE COURT: So I don't think that question was even
18 raised or discussed.

19 MR. ASHINOFF: We didn't need the powers of attorney,
20 your Honor.

21 (Colloquy not on the record.)

22 MR. ASHINOFF: We've never needed the powers of
23 attorney, and I have four or five different independent
24 grounds, and they're in the reply.

25 But it's worth talking about because your Honor has given

1 this a lot of thought, so I'd like the opportunity to lay some
2 of this out.

3 Number one, the Nevada Revised Statute Section 645B
4 applies only to mortgage brokers. Compass is not a mortgage
5 broker.

6 Silar's not a mortgage broker, and Asset Resolution is not
7 a mortgage broker nor did Compass, Silar, or Asset Resolution
8 take one scintilla of mortgage-brokerage rights when they
9 bought out a 363.

10 THE COURT: Why do you think --

11 MR. ASHINOFF: They bought --

12 THE COURT: -- I mandated that Windemere, a
13 Nevada-state licensee, had to be involved? Why do you think I
14 did that?

15 MR. ASHINOFF: So that there would be a
16 jurisdictional nexus in Nevada, but we're subject --

17 THE COURT: And so that --

18 MR. ASHINOFF: -- in personam jurisdictions.

19 THE COURT: -- a licensed brokerage would be
20 involved.

21 MR. ASHINOFF: Okay. And I understand that, but the
22 issue, this whole issue, about whether that statute applies to
23 these people or whether there's a fiduciary duty has not yet
24 been litigated out at all, and we have differences with the
25 lenders on that.

1 But my point here is that the only rights that they bought
2 out of bankruptcy was loan-servicing rights, and at least two
3 other federal courts have recently decided that those rights
4 are not fiduciary -- those contracts do not -- they create
5 fiduciary relationships.

6 There's a Southern District of Florida decision, very
7 recent. There's a Southern District of New York decision --

8 THE COURT: Respectfully --

9 MR. ASHINOFF: -- as distinct from brokerage.

10 THE COURT: -- I will totally disagree with those
11 decisions. To the extent that those decisions are saying there
12 is no fiduciary relationship simply based upon the contractual
13 obligation of servicing your loan, I agree.

14 To the extent those decisions are saying that when you
15 collect and hold funds there is no fiduciary obligation with
16 respect to those funds, I totally disagree, and you can appeal
17 that one to the circuit.

18 MR. ASHINOFF: Right. You know, the holding of the
19 funds, your Honor, I don't have to argue over because the
20 simple fact is the contractual servicing rights themselves
21 don't create a completely-broad fiduciary relationship.
22 Obviously, when you're holding the funds --

23 THE COURT: That's an issue --

24 MR. ASHINOFF: -- they're in a lockbox.

25 THE COURT: -- that remains for --

1 MR. ASHINOFF: Right.

2 THE COURT: -- the merit discussion.

3 MR. ASHINOFF: Right.

4 THE COURT: But I do, respectfully, at this juncture
5 disagree. I think your obligation, your assumed obligation,
6 Silar's assumed obligation to service because it assumed then
7 assigned to Asset Resolution, creates a fiduciary obligation as
8 well.

9 MR. ASHINOFF: With respect to holding of the funds,
10 perhaps, but not with --

11 THE COURT: More than that.

12 (Colloquy not on the record.)

13 MR. ASHINOFF: Your --

14 THE COURT: There is --

15 MR. ASHINOFF: Your --

16 THE COURT: -- a fiduciary obligation, certainly, in
17 Asset Resolution and, potentially, in Silar by virtue of
18 selecting and creating Asset Resolution. They're wholly-owned
19 I'm assuming.

20 There is a fiduciary obligation. I've said it here a
21 number of times, and I'll repeat it today. You have a
22 fiduciary obligation.

23 You own direct-lender interests. It's true. You can
24 operate on your own account and for your own benefit, your own
25 interest, but you are also a fiduciary.

1 And when you make decisions as a servicer that impair the
2 beneficiaries of your trust, you violate your fiduciary duty.
3 That's my opinion of the law. And, of course, it remains a
4 question for the merits decision.

5 MR. ASHINOFF: Okay.

6 THE COURT: But I've said it before, and I've
7 repeated it here today, so that Silar can't disclaim notice of
8 it here (indiscernible).

9 MR. ASHINOFF: Yes. But where it comes pertinent for
10 today is their claim that because this was a fiduciary
11 relationship it can't be assigned, and the fact is if they
12 thought that they had to raise that during the bankruptcy.

13 But, number two --

14 THE COURT: Certainly --

15 MR. ASHINOFF: And --

16 THE COURT: -- vis-a-vis Silar.

17 MR. ASHINOFF: And, number two, your Honor,
18 Section 10 of the LSAs provides that the LSAs "shall remain" --
19 and I'm quoting -- "shall remain in effect until lenders'
20 interest in all notes and deeds of trust with respect to loans
21 arranged and/or serviced by USA is completely liquidated,"
22 and --

23 THE COURT: That's Judge Riegle's order.

24 MR. ASHINOFF: No. What I'm reading from, actually,
25 your Honor, is Section 10 of the LSAs, the actual contracts

1 that were signed, so the actual provision in the LSAs does not
2 say your right to service ends --

3 THE COURT: Read it again.

4 MR. ASHINOFF: -- when the loan's in maturity.

5 THE COURT: Read it again.

6 MR. ASHINOFF: Section 10 says the LSAs, quote,
7 "shall remain in effect until lenders' interest in all notes
8 and deeds of trust with respect to loans arranged and/or
9 serviced by USA is completely liquidated."

10 So whether a separate power under Nevada law to do
11 brokerage expire or not, the actual power that the LSA gave
12 explicitly on its terms was to carry the ability to service
13 until the entire investment was liquidated, and that clearly is
14 the contractual right that was sold out of bankruptcy.

15 And the other interesting aspect of that --

16 THE COURT: You know, there's a limit to that one,
17 too, and I think I need to make a record. I've learned through
18 hard experience -- I apologize -- that if I don't correct
19 counsels' statements on either side of fact, then they start
20 arguing to the appellate court this X, Y, Z is a fact when, in
21 essence, all I was doing was sitting quietly, so I've learned
22 through hard experience that I have to correct statements of
23 fact.

24 Your last point was on what? It was on --

25 MR. ASHINOFF: Section 10 of the LSAs that says --

1 THE COURT: You certainly don't contend, do you, that
2 if all of the direct-lender interests and all of Compass'
3 interest let alone USA Commercial --

4 (Colloquy not on the record.)

5 THE COURT: -- was transferred to other direct
6 lenders such that Compass -- the only involvement Compass had
7 at all was as a servicer, do you contend here that based upon
8 this sale that the direct lenders didn't have a right to
9 terminate Compass --

10 MR. ASHINOFF: No. I had never --

11 THE COURT: -- as a servicer because of that
12 language?

13 MR. ASHINOFF: No, your Honor. In fact, if it's
14 terminated --

15 (Colloquy not on the record.)

16 MR. ASHINOFF: -- in accordance with the terms, of
17 course, that's doable.

18 THE COURT: Okay. All right.

19 MR. ASHINOFF: I --

20 THE COURT: I'm with you.

21 MR. ASHINOFF: I have no quibble with that, but there
22 hasn't been a termination, and --

23 THE COURT: Okay.

24 MR. ASHINOFF: And we don't believe that there should
25 be.

1 But, also, your Honor, Section 11 of the LSAs goes
2 further. It says, "With respect to each loan, lender hereby
3 agrees that USA shall have full power and authority, and lender
4 hereby appoints USA as its true and lawful attorney in fact
5 to," and then it has a recitation of all the things that you
6 can do.

7 And then it says, "Upon USA's request, lender agrees to
8 execute and deliver in the presence of a notary public a
9 declaration of (indiscernible) power pursuant in a form
10 consistent to Chapter 645(b) which, quote, 'pursuant to which
11 lender shall further evidence the appointment of USA.'"

12 In other words, the separate power was just a further
13 evidence of the contract, what the contract had already
14 appointed under Section 10 and 11, and that's why I say that
15 whole issue is a red herring. You didn't need the separate
16 power to service the loans.

17 USA was going to be mortgage brokering. That was the
18 first thing they were going to do. And, of course, it needed
19 to be a Nevada mortgage broker and licensed and have power to
20 mortgage broker.

21 Respectfully, the LSAs gave the contractual right to the
22 servicer to service as a separate matter as read, and so that's
23 why I say that these separate power-of-attorney arguments --

24 THE COURT: In fact, to go a little further --

25 MR. ASHINOFF: -- are a red herring.

1 THE COURT: -- it gave USA Commercial the right to
2 demand a power of attorney --

3 MS. SHUMENER: Um-h'm.

4 THE COURT: -- if anybody said they didn't have
5 sufficient authority.

6 MR. ASHINOFF: If they wanted or needed it, but they
7 didn't have to have it because the agreement gave it, so that's
8 why I say to your Honor it's a red herring.

9 The last point I'd make as to why the argument about the
10 power of attorney is a total red herring is the fact that even
11 under the LSA there's a provision that on certain circumstances
12 51 percent or more of the lenders could get together and
13 appoint a servicer.

14 Well, if 51 percent of them can, then the other 49 percent
15 obviously don't have the right to say you can't because you
16 don't have my power or you can't because I had a veto or you
17 can't for any other reason.

18 So, obviously, the agreement itself undermines the entire
19 premise that each lender had this kind of huge control --

20 THE COURT: I'm inclined --

21 MR. ASHINOFF: -- unprecedented.

22 THE COURT: -- to agree. I think, really, to the
23 extent it's a power of attorney at all it's an irrevocable
24 power. It's coincident with its terms, limits. Parameters are
25 coincident with the LSAs.

1 MR. ASHINOFF: Okay.

2 THE COURT: That is in order to terminate such a
3 power if you need a power --

4 MR. ASHINOFF: Okay.

5 THE COURT: -- it's coincident with your right to
6 terminate --

7 MS. SHUMENER: Um-h'm.

8 THE COURT: -- the LSAs.

9 MR. ASHINOFF: Okay. Your Honor, I'd like to go to
10 the preliminary-injunction order because I do want to make the
11 record that the Court will consider when it's ruling on the
12 extension of it.

13 The preliminary-injunction order at paragraph 11 says
14 prohibition on Compass transfers. Now, Compass has already had
15 the servicing agreement.

16 It says, "With the exception of sales, assignments
17 transfers, hypothecations, or encumbrances of Compass fees made
18 by Compass to Silar or to a licensed subservicer, Compass shall
19 not sell, assign, transfer, hypothecate the Compass fees and
20 Compass' interests."

21 So your preliminary-injunction order which was also
22 heavily litigated recognized Silar's right to step in.

23 THE COURT: Right.

24 MR. ASHINOFF: And it can close --

25 THE COURT: So --

1 MR. ASHINOFF: -- and take the rights.

2 THE COURT: -- in extending the preliminary
3 injunction, I should simply substitute the word "Silar" for
4 "Compass".

5 MR. ASHINOFF: If your Honor says to me that you
6 don't think Asset Resolution had the right -- that Silar had no
7 right to foreclose in the standard, traditional way in this
8 country --

9 THE COURT: No.

10 MR. ASHINOFF: -- then I would ask --

11 THE COURT: I'm not saying that.

12 (Colloquy not on the record.)

13 MR. ASHINOFF: -- that it be Silar, and I'll talk to
14 my client about moving it back, but the truth is
15 Asset Resolution has significant assets, and they're doing the
16 job.

17 Their papers are derelict. There's not a single response
18 to the affidavit --

19 THE COURT: I don't want --

20 MR. ASHINOFF: -- of Reiner --

21 THE COURT: -- to approve the assignment to
22 Asset Resolution. I want to recognize it, acknowledge it, and
23 acknowledge their current status --

24 MR. ASHINOFF: As --

25 THE COURT: -- by way of fact they are servicing.

1 MR. ASHINOFF: Okay. Okay.

2 THE COURT: So as long as you can craft language,
3 maybe there is no problem with including Silar and
4 Asset Resolution here, and I'll seek a deferral --

5 MR. ASHINOFF: Well --

6 THE COURT: -- to further reply --

7 MR. ASHINOFF: -- Asset Resolution --

8 THE COURT: -- as long as what I'm saying is Silar
9 and Asset Resolution without approval of Asset Resolution are
10 hereby enjoined from further transfer --

11 MR. ASHINOFF: Well, we've already represented --

12 THE COURT: -- without Court approval.

13 MR. ASHINOFF: -- to the Court --

14 THE COURT: That may be sufficient.

15 MR. ASHINOFF: I've already represented to the Court
16 at the last hearing that we would not make a further transfer
17 without the Court's permission, so I've made that
18 representation on the record at the last session --

19 THE COURT: Then maybe --

20 MR. ASHINOFF: -- to your Honor.

21 THE COURT: -- there's not a problem. I need to
22 hear --

23 MR. ASHINOFF: But --

24 THE COURT: -- the reply --

25 MR. ASHINOFF: But --

1 THE COURT: -- including Asset Resolution's name
2 there, but you --

3 MR. ASHINOFF: But --

4 THE COURT: -- recognize that under my theory so far
5 with Silar as an acknowledged coincident holder with Compass --
6 (Colloquy not on the record.)

7 THE COURT: -- it's totally appropriate to substitute
8 Silar's name.

9 MR. ASHINOFF: But Silar doesn't --

10 THE COURT: But that very preliminary-injunction
11 language prevented Silar as well other than assignment to its
12 duly-appointed licensed -- what's the language --
13 duly-appointed licensed agent. It prohibited Silar as well --

14 MR. ASHINOFF: But --

15 THE COURT: -- from a further transfer.

16 MR. ASHINOFF: But, your Honor, I need to go a little
17 bit further to complete this line because Section 7 --

18 THE COURT: Read the language of the last lines first
19 before you go on. It says, "Compass" --

20 MR. ASHINOFF: Where are we?

21 THE COURT: The last one you quoted, the prohibition
22 upon further assignment.

23 MR. ASHINOFF: Right. There's a subsequent order
24 that supercedes it.

25 THE COURT: Well, read it, first, before you --

1 MR. ASHINOFF: Okay.

2 THE COURT: -- read --

3 MR. ASHINOFF: Yeah. No. I --

4 THE COURT: -- the superseding --

5 MR. ASHINOFF: I would --

6 THE COURT: -- language.

7 MR. ASHINOFF: "Prohibition on Compass transfers with
8 the" --

9 THE COURT: You're reading the last language you just
10 quoted to me.

11 MR. ASHINOFF: Yeah. I'm reading that paragraph.

12 THE COURT: Please.

13 MR. ASHINOFF: "With the exceptions of sales,
14 assignments, transfers, hypothecations, or encumbrances of
15 Compass fees made by Compass to Silar Advisors, LP, or
16 Silar Special Opportunities Fund, Ltd., or to a licensed
17 subservicer, Compass shall not sell, assign, transfer, or
18 hypothecate, or encumber the Compass fees and/or Compass'
19 interests as a direct lender in any loan in which it is
20 currently the servicer without further order of this Court
21 obtained upon a motion by Compass."

22 THE COURT: Okay. I'm willing to substitute in
23 Silar. I already did, but I want it understood that I am not
24 -- and I'm recognizing Asset Resolutions.

25 But I want it understood that Silar and Asset Resolution

1 are now under that language. They are prohibited from further
2 assignment.

3 MR. ASHINOFF: But, your Honor, I have a problem with
4 what you're suggesting, but not with the piece that you're most
5 concerned about. I don't have a problem saying that
6 Asset Resolution will not further assign it.

7 But, in fact, Silar doesn't own these rights.
8 Asset Resolution is the sole owner now, so the name that has to
9 go in the injunction is Asset Resolution. It doesn't mean that
10 at the end of this case --

11 THE COURT: I understand --

12 MR. ASHINOFF: -- you won't issue --

13 THE COURT: -- your request. Denied. Silar's name
14 will also go in the injunction.

15 MS. SHUMENER: Um-h'm.

16 MR. ASHINOFF: Well, on that you mean for the --

17 THE COURT: Right.

18 MR. ASHINOFF: Yeah. That's fine. But the other
19 provisions which talk about the ability to sell properties and
20 get consents, that needs to be Asset Resolution. They're the
21 only ones that own the rights now.

22 THE COURT: I want the language to be Silar and
23 Asset Resolution. In other words, I'm acknowledging your
24 designation, your assignment. I'm acknowledging it. I'm just
25 not approving it.

1 MS. SHUMENER: Um-h'm.

2 (Colloquy not on the record.)

3 THE COURT: So I'm --

4 MR. ASHINOFF: I'm --

5 THE COURT: -- protecting --

6 MR. ASHINOFF: I'm not --

7 THE COURT: I'm willing to protect Asset Resolution.
8 I want Silar's name there, too.

9 MR. ASHINOFF: All right. I hear the Court, and,
10 obviously, we'll do as the Court instructs. I'm not smart
11 enough on my feet to figure out all the implications of that as
12 I stand here, so I'd reserve my rights to argue that it doesn't
13 change anything, but make --

14 THE COURT: You --

15 MR. ASHINOFF: -- the injunction applicable.

16 THE COURT: You may reserve your rights.

17 MR. ASHINOFF: The next order is the July 11th, 2008,
18 order. It says at paragraph 8, "Silar may exercise its
19 contractual rights."

20 And it says, "Nothing in this order shall prevent Silar
21 from exercising any contractual rights and remedies under and
22 consistent with the contracts and agreements controlling its
23 relationship with Compass, including consistent with the
24 preliminary-injunction order its right to foreclose on its
25 collateral and its right to appoint an alternative loan

1 servicer."

2 Now, what --

3 THE COURT: Just leave that language the way it is.

4 MR. ASHINOFF: The order also says, "This order
5 supercedes all previous orders and directives of the Court to
6 the extent that such are in conflict with the contents
7 contained herein."

8 THE COURT: And read --

9 MR. ASHINOFF: And I read --

10 THE COURT: -- the last language before that one
11 again one more time.

12 MR. ASHINOFF: Paragraph 8, "Silar may exercise its
13 contractual rights. Nothing in this order shall prevent
14 Silar" --

15 THE COURT: But what we were really referring
16 thereto, of course, is its rights to foreclose.

17 MR. ASHINOFF: To foreclose. And what happened --

18 THE COURT: Go ahead. Read the language.

19 MR. ASHINOFF: "Nothing in this order shall prevent
20 Silar from exercising any contractual rights and remedies under
21 and consistent with the contracts and agreements controlling
22 its relationship with Compass, including consistent with the
23 preliminary-injunction order its right to foreclose on its
24 collateral and its right to appoint an alternative loan
25 servicer," and --

1 THE COURT: That language will just remain the same,
2 but you understand an alternate loan servicer -- I mandated
3 previously and the mandate is still in effect it must be a
4 licensed Nevada servicer.

5 MR. ASHINOFF: Your Honor had said it has to be
6 licensed Nevada subservicer, and we have retained Windemere as
7 the subservicer, but Asset Resolution is the servicer.

8 And in the preliminary-injunction order, your Honor,
9 paragraph 7 where you talked about Compass' ability to
10 foreclose on property, you explicitly recognized Compass'
11 ability to pursue a foreclosure with respect to a loan in
12 accordance with the applicable LSAs. And in Sub A of 7, you
13 said, "Compass or a single-purpose entity designated by Compass
14 is authorized to foreclose."

15 All that Silar did is use a single-purpose entity
16 designated and controlled by Silar to foreclose. It didn't
17 evade anything. It was trying to do what is commercially done
18 universally --

19 THE COURT: Um-h'm.

20 MR. ASHINOFF: -- when you foreclose.

21 It was not to create a shell. It was the way foreclosures
22 are done in the United States, and the Court with its vast
23 experience can take judicial notice of that.

24 So this whole notion of trying to evade by putting
25 Asset Resolution in and how nefarious, we did what the

1 injunction contemplated in the way the injunction is
2 contemplated.

3 And for the lenders to come in today and say, oh,
4 your Honor, you shouldn't extend this injunction, you shouldn't
5 have this, we never approved Silar, we're too many orders down
6 the road for those arguments.

7 (Colloquy not on the record.)

8 MR. ASHINOFF: With respect, your Honor, there is a
9 law of this case starting with the confirmation order and then
10 the preliminary-injunction order and now the July 11th order.

11 It's too late for them to try to upend my clients'
12 servicing rights which they've been trying to do even before
13 Compass ever bought them because they don't like the deal.

14 At some point, that becomes final. At some point, these
15 orders have the force of law in this case, and we will be
16 governed by them, and we will attorn to them, but so must the
17 direct lenders. It's too late to start arguing the injunction
18 should have had a bond. That's what appellate courts are for.

19 The truth is all the money they care about is in a lockbox
20 account, and my client has been denied the right to take what
21 it believes is a significant component of those fees and has
22 lost all the interest, but there's no bond that was put up by
23 the direct lenders that would stop my client from accessing
24 millions of dollars.

25 There's no better claim for a bond here from my client

1 than there is from the lenders. In fact, my clients are
2 probably out more money as the largest direct lender and as a
3 servicer who can't get at these fees. The bond probably should
4 be higher, but we're too late on that.

5 There was a three- or four-day hearing. They were all
6 heard. The Court decided it didn't need a bond. Under 105
7 because you still are policing the legitimacy and the sanctity
8 of the confirmation sale, you don't need a bond, anyway.

9 And under 65, you decided not to impose one for good
10 reason because the money was going to be locked up. You don't
11 need the bond.

12 And the evidence in this record is undisputed that my
13 client has been working extremely hard to try to service these
14 properties as servicer in the six months its been in the job.

15 And there's nothing in the record that's been made on this
16 motion to contradict the Reiner declaration or the Dickinson
17 declarations of all the different efforts, and I encourage the
18 Court to look at that when you're crafting any further relief
19 here.

20 The fact is they're doing the job, and they're doing it
21 right. We've been thwarted here in the inability to sell a
22 property because we can't even get the lenders to agree to the
23 distribution that the injunction provided for. They're
24 relitigating that. No. You can't even take that out says
25 Ms. Rasmussen.

1 We're trying our best here, your Honor, but it's not the
2 problem on our side of the caption. We're not the gang that
3 can't shoot straight.

4 My client is professional. It has years of experience.
5 It's been documented in the record, and they're doing the job
6 now. You don't have a problem at this end. We can go forth
7 and litigate.

8 On the issue of a personal-service contract, we cited a
9 lot of law to make it clear that this is a commercial contract.
10 That these are bought and sold in the hundreds. That
11 corporations generally are not found to be parties to
12 personal-service contracts because it uses some unique and
13 individual and extraordinary talent.

14 THE COURT: I really think I have listened patiently
15 now -- 1:00 o'clock -- to these arguments on both sides.

16 MR. ASHINOFF: Okay.

17 MS. RASMUSSEN: Your Honor, may I just give a brief
18 rebuttal on my motion to vacate?

19 THE COURT: Very quickly --

20 MS. RASMUSSEN: I --

21 THE COURT: -- please.

22 MS. RASMUSSEN: I just have a couple of pages.

23 THE COURT: Um-h'm.

24 MS. RASMUSSEN: And I promise --

25 MR. ASHINOFF: Thank you, your Honor --

1 MS. RASMUSSEN: -- it will (indiscernible).

2 MR. ASHINOFF: -- for your time and attention.

3 THE COURT: It should be very brief.

4 MS. RASMUSSEN: Okay. Would you like me to do it
5 from here?

6 THE COURT: That's fine.

7 MS. RASMUSSEN: Okay. With regard to the fiduciary
8 issue because that's one of the issues I raised in the motion
9 to vacate the preliminary injunction, it is a conflict of
10 interest for Silar to service the loans and to -- I mean, first
11 of all, they're suing the direct lenders, and then they want to
12 service their loans, so how it is that we could be in this
13 tortured circumstance I don't know.

14 But the Court is right with regard to the issue of
15 fiduciary, whether or not they're a fiduciary. They clearly
16 are under Nevada law.

17 All they have cited to you is New York and Florida law
18 which isn't what's controlling here in this courtroom, and the
19 Court is right with regard to that issue.

20 Secondly, I have requested the bank records from
21 Mr. Howard. I don't have them. When this goes directly to the
22 issue of the bond should presume because we don't have any
23 representation to the contrary -- and I can't tell you that
24 there has not been commingling -- the Court should presume that
25 there has been commingling, and this is exactly one of the --

1 it's one of the reasons why a bond is required.

2 Third, there was no evidentiary hearing that lasted three
3 or four days on the preliminary injunction, and that's just a
4 misstatement of the record.

5 And with regard to their allegation that I misstate the
6 record on the UCC filing, I apologize. I was not aware of the
7 UCC filing, and that's because it was done in Delaware, but
8 there is, and I have looked at it here today. There was a UCC
9 filing.

10 But when I did a search in New York and Nevada, there were
11 none, and there are no UCC filings in New York where Compass
12 was or in Nevada.

13 Finally, the bank -- and I know Mr. Howard wants to
14 respond on the bank records. I'm just telling you we don't
15 have them.

16 And the Court needs to put -- if the Court is going to
17 continue this preliminary injunction in the manner that it has
18 indicated it is going to substituting Silar and
19 Asset Resolution for Compass, a bond is required, and a
20 substantial bond is required, and that's because it's required
21 to protect the rights of the direct lenders.

22 Finally, with regard to the last thing that Silar just
23 represented that somehow we can't have a sale of Gramercy
24 because we won't agree to it, that is a misrepresentation of
25 the status of affairs. Nobody is disagreeing to the sale.

1 We're simply asking that until the Court can -- until we
2 can have an accounting of the amounts, and the Court can look
3 at it and determine what should happen with the funds that
4 those funds be escrowed.

5 And it's very simply the servicing funds and the advance
6 interest-payment funds, and it is not that substantial of a
7 money that it should thwart the entire sale.

8 With regard to the powers of attorney, Nevada law requires
9 it under Chapter 645. So this notion that somehow Silar can go
10 through this whole thing without any power of attorney, and
11 they can simply transfer because there is an intent, the powers
12 of attorney -- and this is why they're personal-service
13 contracts.

14 Powers of attorney were initially issued to USA Commercial
15 Mortgage, and, you know, somehow Silar thinks that they can get
16 by without it or that these powers of attorney can simply be
17 transferred. They can't, and they haven't, and they're
18 required under Nevada law.

19 Thank you.

20 THE COURT: Thank you.

21 I'm denying the motion to vacate the preliminary
22 injunction. The preliminary injunction will continue in effect
23 for the reason that I have already stated. It's too late to
24 request bonds. That issue was already considered before.

25 The only new issue before us at all is the substitution of

1 Silar and Asset Resolution. I will acknowledge the
2 substitution made by Silar. I will not approve it at this
3 time. That depends upon the determination of the merits.

4 And you will substitute both Silar and Asset Resolution in
5 in the language of the preliminary injunction. That's the only
6 issue that's up for reconsideration.

7 There is no other reason to reconsider vacating or
8 changing the status quo and, therefore, the preliminary
9 injunction, so that will remain in effect on its current status
10 and according to its present terms.

11 I'll issue a brief, little memorandum, but, otherwise, I
12 do need the revised preliminary injunction with the
13 substitution of the names and with the understanding, of
14 course, that I'm not approving. I'm just acknowledging the
15 substitution of Asset Resolution.

16 MS. RASMUSSEN: Thank you, your Honor. Just with
17 regard --

18 MS. SHUMENER: Thank you.

19 MS. RASMUSSEN: -- to the motion to vacate, I think a
20 separate order should be presented just denying that, a
21 simple --

22 THE COURT: That's fine.

23 MS. RASMUSSEN: And I'll submit it if the Court
24 wishes.

25 MR. ASHINOFF: Your Honor, two --

1 MS. RASMUSSEN: But, obviously, the revision of the
2 language --

3 (Colloquy not on the record.)

4 MR. ASHINOFF: Two --

5 MS. RASMUSSEN: Okay.

6 MR. ASHINOFF: Two matters. If we can talk in the
7 hall and figure out how to get --

8 THE COURT: Yeah.

9 MR. ASHINOFF: -- this property sold.

10 THE COURT: I'll give you a time. Should I let you
11 return? You have already imposed not only upon us, but upon
12 all the cases that follow. Shall I ask you to return at 2:30
13 on that motion to approve the sale? I'll order you to return
14 at 2:30.

15 MR. ASHINOFF: If we can work something out, we will.
16 And if not, can we let the clerk know that it would be not
17 necessary to take any more time --

18 THE COURT: Yeah.

19 MR. ASHINOFF: -- because we couldn't --

20 THE COURT: I have given you --

21 MR. ASHINOFF: Yeah.

22 THE COURT: -- a court-hearing date. You need a
23 lunch hour, too, just like I do, so I'll --

24 MR. ASHINOFF: 2:30 is fine.

25 THE COURT: -- order you to come back no later than

1 3:30.

2 (Colloquy not on the record.)

3 THE COURT: No later than 3:30 or to advise, of
4 course, that you don't need a further hearing.

5 MR. ASHINOFF: All right. One --

6 THE COURT: And I'm just telling you that I'm here.
7 I'm willing to approve the sale. You folks need to work out --

8 MS. SHUMENER: Um-h'm.

9 THE COURT: -- the interim resolution, a status quo,
10 so that you both don't cut off your own right foot. Approve
11 the sale and get on with a segregation or a nonwaiver of
12 rights, whatever else is necessary or sufficient to hold the
13 status quo.

14 MR. ASHINOFF: One other issue, your Honor.
15 Your Honor mentioned the June 8th date. I've had a chance to
16 check calendar briefly.

17 If it could either be June 1 or June 22, I'd greatly
18 appreciate one of the other dates as opposed to June 8th based
19 on personal family commitments.

20 THE COURT: 3:30, please. Be here no matter what.

21 And you'll need to be here, too, Counsel. We'll take up a
22 continuance of any objections to your pro hac vice.

23 MR. COLLINS: Thank you, your Honor.

24 MR. BUBALA: Your Honor?

25 THE COURT: Sure. Yeah.

1 MR. BUBALA: This is Lou Bubala of Jones Vargas
2 appearing for Ms. Chubb. In order for this call-in
3 (indiscernible), is it possible (indiscernible) a hearing at
4 3:30 or at a time certain?

5 THE COURT: You're breaking up, sir. We didn't even
6 hear you.

7 MR. BUBALA: Is it possible to confirm a hearing at a
8 time certain?

9 THE COURT: That's what I just did.
10 (Colloquy not on the record.)

11 THE COURT: The time is 3:30.

12 MR. BUBALA: Okay. Thank you, your Honor.

13 THE COURT: Thank you.

14 (Thereupon, the case was trailed at 01:22:13 p.m.)

15 (Court reconvened at 04:22:52 p.m.)

16 (Thereupon, the proceedings were sealed
17 at 04:22:52 p.m.)

18 (Thereupon, the proceedings were unsealed
19 at 04:32:35 p.m.)

20 THE COURT: You're back --

21 MR. ASHINOFF: Your Honor --

22 THE COURT: -- on the record.

23 MR. ASHINOFF: -- unfortunately, we have some what
24 may be very potentially-significant problems with the
25 Bickel & Brewer role in this case and the manner in which it

1 was procured.

2 We have information, and, you know, we will make an
3 appropriate motion, but it is relevant to the pro hac and the
4 signing up with the lenders.

5 We have information that, unfortunately, the
6 Lender Protection Group and Ms. Cangelosi and her cohorts have
7 engaged in another fear-mongering campaign in writing with the
8 direct lenders --

9 (Colloquy not on the record.)

10 MR. ASHINOFF: -- essentially to scare them into
11 retaining counsel telling them things like Silar is going to
12 sue all of them, and that the Judge has told Silar in open
13 court to sue --

14 THE COURT: But what's wrong with that? What I found
15 wrong contrary -- I apologize -- Ms. Rasmussen, to your
16 representation earlier, what I found wrong with Ms. Cangelosi's
17 conduct is that she engaged in a securities fraud.

18 That is she procured assignment of property interests in
19 exchange for a profit participation, the classic definition of
20 a security.

21 If all she is doing whether she's engaging in fraud or
22 not, whether she has under Section 15 a proper proxy statement
23 on file, whether it's a proper 34 Act filing or not, if she's
24 not procuring assignments of property interest in exchange for
25 a profit percentage, there's no security issue involved.

1 MR. ASHINOFF: I'll come to the profit percentage in
2 a moment, your Honor. If I --

3 THE COURT: And --

4 MR. ASHINOFF: If I could just have a --

5 THE COURT: And, otherwise, you have no standing.
6 You have standing on the securities issue and who has proper
7 standing here in this court.

8 But if all that's involved is an effort to have direct
9 lenders directly involved whether they are defrauded or not is
10 not for you to raise.

11 MR. ASHINOFF: Your Honor, here's the problem, and
12 I'd like to put it on the record.

13 (Colloquy not on the record.)

14 MR. ASHINOFF: Your Honor said to me at the last
15 hearing we need to know who you're going to sue and for what
16 you're going to sue them. People are entitled --

17 THE COURT: That's right.

18 MR. ASHINOFF: -- to know if they're going to be in
19 or out.

20 THE COURT: Right.

21 MR. ASHINOFF: In response to that, we filed our
22 amended answer and counterclaims --

23 THE COURT: And --

24 MR. ASHINOFF: -- and third-party --

25 THE COURT: And you --

1 MR. ASHINOFF: -- complaints.

2 THE COURT: Basically, you have disowned Compass'
3 tort claims.

4 MR. ASHINOFF: We have disowned tort claims that --

5 THE COURT: You --

6 MR. ASHINOFF: -- Compass had.

7 THE COURT: You just want your rights --

8 MR. ASHINOFF: We have not brought --

9 THE COURT: -- protected.

10 MR. ASHINOFF: We have not brought our own tort
11 claims. More to the point, we've only named out of the
12 3500 lenders 62 out of 3,500 lenders. We don't plan to sue the
13 rest. We took your comments to heart. We tried to be
14 effective.

15 These letters are telling them that we're coming after
16 them and are going to sue them for their life savings, and they
17 had better sign up counsel right away.

18 Your Honor, the fact is they're being stampeded into
19 signing up counsel for a litigation that we have no intention
20 of bringing them into.

21 And, frankly, if they tried to come in now en masse, we'd
22 have real problems given the schedule --

23 THE COURT: Did you not --

24 MR. ASHINOFF: -- if another 1,000 --

25 THE COURT: -- countersue them?

1 MR. ASHINOFF: No. We counter --

2 THE COURT: You believe --

3 MR. ASHINOFF: Our total --

4 THE COURT: -- you have them covered by the
5 injunction, anyway. You don't need to countersue them. You're
6 not going to countersue them for the tort claims.

7 MR. ASHINOFF: We are not going to countersue anyone
8 for a tort, your Honor, but the point is we only have 62 people
9 we counterclaimed against. Most of them are already in the
10 case.

11 And, yet, these thousands of people are getting a
12 communication that says Silar's coming after you. You better
13 protect your life savings. You better sign up.

14 It's untrue, and we want these people to know the truth
15 that they're not in any imminent threat of getting sued by
16 us.

17 THE COURT: Send them a letter.

18 MS. SHUMENER: Yeah.

19 (Colloquy not on the record.)

20 THE COURT: We're --

21 MR. ASHINOFF: We may do that.

22 THE COURT: We have no present intent to sue you. If
23 you join the lawsuit, it will be with the understanding that we
24 will then have the right to counterclaim against you. We have
25 no present intent to sue you.

1 MR. ASHINOFF: Yeah. And I want to affirm
2 100 percent of the way your Honor just described it. That is
3 our position.

4 In addition, we didn't sue anybody for a tort. We're
5 trying to narrow this case and deal with the contract
6 issues.

7 THE COURT: You can further add in your letter that
8 the Judge gave you a deadline. If you're going to countersue,
9 do it, and the deadline has passed.

10 MR. ASHINOFF: Right.

11 THE COURT: So the only way they can be brought into
12 the lawsuit is if they bring themselves in.

13 MR. ASHINOFF: Right. And I --

14 THE COURT: And then --

15 MR. ASHINOFF: And --

16 THE COURT: -- you can countersue them.

17 MR. ASHINOFF: And they will read this transcript,
18 and I'm happy that they will read both of our comments in this
19 transcript to this effect.

20 There's one other problem, your Honor, that we need to
21 raise, potentially, with respect to the application of
22 Bickel & Brewer.

23 And if I can just approach the Court and hand up to it the
24 Court's May 15th, 2008, order, and I have a couple of copies
25 for --

1 THE COURT: Please. Uh-huh.

2 MR. ASHINOFF: -- counsel.

3 THE COURT: Counsel.

4 MR. ASHINOFF: May I approach?

5 THE COURT: Please.

6 (Colloquy not on the record.)

7 THE COURT: And give them copies as well.

8 MR. ASHINOFF: I will.

9 (Colloquy not on the record.)

10 MR. ASHINOFF: If I can direct the Court's attention
11 here, your Honor, will recall dealing with the unfortunate
12 matters of the way Ms. Cangelosi and Cross' principals
13 proceeded to try to act in the past and the need for this Court
14 to enter an order.

15 And I would like to simply address this briefly and
16 quickly to paragraph 6 of this order, page 4 of 9, and
17 paragraph 7, and then I'll make my point.

18 Paragraph 6 of this order said, "FDH and Cangelosi are
19 prohibited from taking any action on behalf of any direct
20 lender in any manner related to the instant litigation" --

21 THE COURT: Wait a minute. I didn't follow you.
22 "FDH and Cangelosi" --

23 MR. ASHINOFF: Yes.

24 THE COURT: -- "with respect to any beneficial
25 interest not held by her are prohibited from taking any action

1 on behalf of any direct lender in any matter related to the
2 instant litigation, including but not limited to."

3 MR. ASHINOFF: Right. "Participating in mediation,
4 responding to proposed loan resolutions; E, negotiating with
5 new counsel or retaining such counsel on behalf of any" --

6 THE COURT: In other words --

7 MR. ASHINOFF: -- "other direct" --

8 THE COURT: -- she can't be an intermediary between
9 other beneficial owners other than herself and counsel.

10 MR. ASHINOFF: Correct.

11 THE COURT: She --

12 MR. ASHINOFF: Correct.

13 THE COURT: They can retain counsel directly
14 themselves, of course.

15 MR. ASHINOFF: Yes. Paragraph 7, your Honor, and
16 then I'll come to the point with respect to the Bickel & Brewer
17 proposed retention.

18 Paragraph 7 said, "Cross is prohibited from acting on
19 behalf of the direct lenders." It says Cross, and Cross'
20 principal is McGowen Duncan as your Honor will recall, its
21 general counsel and founder and director.

22 "Cross is prohibited from" --

23 THE COURT: Who is McGowen Duncan?

24 MR. ASHINOFF: He was the principal at Cross. He
25 is the cofounder, partner, and general counsel of

1 Cross Equities.

2 It says, "Cross is prohibited from appearing in this
3 litigation. Cross may not take any action on behalf of any
4 direct lenders in any manner related to this litigation."

5 THE COURT: And how is McGowen Duncan involved in
6 counsel's present representation?

7 MR. ASHINOFF: The last subparagraph is
8 paragraph G-2, little 3 of the proposed Bickel & Brewer letter.
9 It states to the lenders that their firm intends to hire
10 McGowen Duncan as co-counsel --

11 THE COURT: Who's firm?

12 MR. ASHINOFF: Bickel & Brewer.

13 THE COURT: And where are you reading to me from?

14 MR. ASHINOFF: I'm reading from a copy of the
15 Bickel & Brewer proposed engagement letter which was
16 provided --

17 THE COURT: Present --

18 MR. ASHINOFF: -- to us.

19 THE COURT: -- engagement letter.

20 MR. ASHINOFF: The one that they're trying to ask the
21 lenders to sign up.

22 THE COURT: They want to represent Jones & Vargas'
23 direct-lender group.

24 MR. ASHINOFF: And about 1,000 or 2,000 other people,
25 and the letter says, "The firm, Bickel & Brewer, will hire

1 McGowen Duncan, Esq., as co-counsel to assist the firm in the
2 litigation and will share 50 percent in the contingency fee, if
3 any, with him."

4 Your Honor, we believe that's a --

5 THE COURT: Who will share?

6 MR. ASHINOFF: Bickel & Brewer will give him
7 50 percent --

8 THE COURT: Give them --

9 MR. ASHINOFF: -- of the fee.

10 THE COURT: -- being who?

11 MR. ASHINOFF: McGowen Duncan, the principal of
12 Cross --

13 THE COURT: Are they --

14 MR. ASHINOFF: -- which we --

15 THE COURT: Is McGowen Duncan a lawyer?

16 MR. ASHINOFF: Yes. But he also is the principal of
17 Cross and is still its general counsel/partner.

18 THE COURT: And the letter says we'll give Cross
19 50 percent or McGowen Duncan 50?

20 MR. ASHINOFF: McGowen Duncan, but he is Cross. He
21 basically is Cross.

22 THE COURT: So is this 50-percent champerty? Is the
23 50 percent with a nonlawyer Cross or is it with a lawyer
24 50 percent and based upon professional-rules-required sharing
25 of legal involvement in the case?

1 MR. ASHINOFF: If Mr. Duncan does what it takes to
2 earn 50 percent of this fee and serves as Nevada counsel, we
3 believe that violates the spirit if not the letter of
4 paragraph 7 of the Court's prior order.

5 THE COURT: Cross here is prohibited.

6 MR. ASHINOFF: Yes. But Cross doesn't act itself.
7 He is the principal who was acting at the time --

8 THE COURT: He certainly --

9 MR. ASHINOFF: -- that led the Court --

10 THE COURT: -- can't act on behalf of Cross anywhere.
11 He certainly cannot receive 50 percent of the fees on behalf of
12 Cross. That would be not only champerty.

13 It would be an absolute bar under our professional rules.
14 The only way he can act vis-a-vis McGowen Duncan is on behalf
15 of a licensed attorney, not Cross.

16 MR. ASHINOFF: Right. But what he's done,
17 essentially, your Honor, is saying if he turns his hat around
18 and says now I'm me, instead of Cross, I can take 50 percent --

19 THE COURT: He --

20 MR. ASHINOFF: -- of this fee.

21 THE COURT: He has the right to do that as long as
22 its true and, in fact, the case as long as he's going to be a
23 lawyer, a participating lawyer, not Cross. Cross can't stand
24 up here in court and say this is Cross on behalf of X, Y, and
25 Z. They can't do that.

1 MR. ASHINOFF: Right. Well --

2 THE COURT: So what --

3 MR. ASHINOFF: -- he wouldn't say --

4 THE COURT: What's the matter with him serving with
5 two different hats? Just as I told one of the earlier
6 litigants here today, a pro se, there's nothing wrong, sir,
7 with a person serving as board of directors for two different
8 entities.

9 MR. ASHINOFF: Your Honor, I was not here in May of
10 2008, and I don't profess to know what led you to get to the
11 point of issuing this kind of prohibition.

12 THE COURT: What upset me is that Cross, a potential
13 financier, was walking in here and Ms. Cangelosi further
14 transferring and encumbering what she had illegally received
15 what I had told her she could not receive, what I had told her
16 unless she did a resolicitation I was going to order her to
17 return, and which she had never done a proper resolicitation,
18 and I was on the verge and that very day ordered her to return.

19 What upset me is that Cross, a potential financier, was
20 walking in here and seeking a conveyance, a further conveyance
21 and assignment, of what she had illegally obtained in direct
22 contravention of direct-lenders' rights.

23 But that doesn't prohibit -- none of this prohibits a
24 direct lender if they want to cut off their own nose or if they
25 want to submit themselves to this jurisdiction for

1 counterclaiming or if they at a minimum just want to protect
2 their own rights from assigning their rights directly to a
3 lawyer, not through Ms. Cangelosi -- no interest can go to
4 Ms. Cangelosi. That's champerty. That's illegal assignment to
5 a nonlawyer -- nor is there any prohibition against assignment,
6 proper assignment, to a real lawyer who will really defend such
7 people here in court.

8 MR. ASHINOFF: And I hear your Honor. I raised it
9 because I wasn't sure if what led the Court to issue this
10 injunction against Cross was conduct the Court found was
11 inappropriate for Cross' principal who would be Mr. Duncan --

12 THE COURT: No.

13 MR. ASHINOFF: -- and whether that's of any concern
14 to the Court.

15 THE COURT: No.

16 MR. ASHINOFF: Okay.

17 THE COURT: I prohibited Cross, no doubt about that.
18 They're not a lawyer, and they had no right to further take in
19 terms of representation or even financing of representation an
20 interest that Ms. Cangelosi had illegally obtained.

21 MR. ASHINOFF: The only other question I have, then,
22 with regard to the Bickel & Brewer application --

23 (Colloquy not on the record.)

24 MR. ASHINOFF: -- is the fact that paragraph G-2,
25 little 1 refers to the potential intention by Bickel & Brewer

1 to hire and, presumably, compensate a litigation-management
2 consultant in the case.

3 And I would like it to be clear that we would view the
4 fact that if that happened to be Ms. Cangelosi that that would
5 run afoul of your Honor's injunction.

6 THE COURT: Or Cross. I think I would be inclined to
7 agree.

8 (Colloquy not on the record.)

9 MR. COLLINS: Your Honor, before we hired such a
10 firm, we would bring it to your attention and make sure. It's
11 no intention at this point for me to make Ms. Cangelosi --

12 THE COURT: Especially, if it's either Ms. Cangelosi
13 or an entity controlled by her or Cross or an entity controlled
14 by Cross, not Mr. Duncan.

15 MR. COLLINS: Absolutely, your Honor. Absolutely.
16 Do you want to state, though, your Honor, at some point
17 depending on --

18 THE COURT: I'll let you respond.
19 Why don't you let him respond.

20 MR. COLLINS: Sure. Thank you.

21 THE COURT: You can have a further reply, of course.

22 MR. COLLINS: Your Honor, Michael Collins on behalf
23 of Bickel & Brewer. You're absolutely correct. The --

24 THE COURT: Mr. Duncan is a principal in your firm?

25 MR. COLLINS: No, he is not.

1 THE COURT: No. It's with him that you would be
2 sharing 50 percent.

3 MR. COLLINS: With Mr. McGowen Duncan as an attorney
4 licensed in the state of Texas.

5 THE COURT: And --

6 MR. COLLINS: He was a former Fulbright lawyer, real
7 estate lawyer. He's intimately --

8 THE COURT: And by way of disclosure, of course,
9 he'll need local counsel which would be Jones Vargas.

10 MR. COLLINS: Right.

11 THE COURT: And he will be participating in the case.
12 You're not just giving him a grand gift of a 50-percent
13 referral fee. He will participate in the case and for --

14 MR. COLLINS: Oh, absolutely, your Honor. I --

15 THE COURT: -- and conduct --

16 MR. COLLINS: I --

17 THE COURT: -- his fair share of the litigation
18 effort.

19 MR. COLLINS: Absolutely. We intend to work him very
20 hard.

21 THE COURT: Uh-huh.

22 MR. COLLINS: Also, your Honor, we expect to talk to
23 him about sharing expenses between our two firms. He may out
24 of pocket come out and share some of the expenses, out of his
25 pocket.

1 It's been very made clear -- excuse me, your Honor -- made
2 very clear -- and I don't want to waive any privilege here --
3 but it's he, not Cross. And if he is helping with the
4 expenses, it's he, not Cross.

5 THE COURT: I don't think I could find anything wrong
6 with that. I do add my caution, of course, to the extent he
7 seeks financing from Cross he's got a potential problem.

8 And to the extent that he expects Cross as opposed to the
9 interest which you folks will get by way of lawyers fees he
10 expects Cross to receive any kind of reimbursement or transfer
11 of interest from these folks, direct lenders, he also has a
12 potential problem.

13 MR. COLLINS: Oh, absolutely, your Honor. None of
14 that -- I'm not saying any of that's intended. But if anything
15 like that happened, we'd come to you first to make sure it's
16 properly represented to you by a motion if it was done, but
17 there's no intention --

18 THE COURT: Okay.

19 MR. COLLINS: -- at this point.

20 THE COURT: Any other response?

21 MS. RASMUSSEN: Your Honor, I have a --

22 MR. COLLINS: No.

23 MS. RASMUSSEN: I am sorry. When it's time, I have
24 just --

25 THE COURT: Okay.

1 MS. RASMUSSEN: -- a couple --

2 MR. COLLINS: And, your Honor, as --

3 MS. RASMUSSEN: -- of things.

4 MR. COLLINS: So as I say, as we do intend to hire a
5 litigation-management consultant, if it has anything to do with
6 Ms. Cangelosi -- and I'm not saying it's going to -- it would
7 come to you first.

8 THE COURT: It's going to be a litigation consultant,
9 right --

10 MR. COLLINS: Yes. Absolutely.

11 THE COURT: -- like a paralegal or a financial expert
12 or somebody who has some expertise, not just Ms. Cangelosi or
13 somebody, an entity owned by her --

14 MR. COLLINS: Oh, absolutely not, your Honor.

15 THE COURT: -- in order to reward her for her past
16 participation.

17 MR. COLLINS: Absolutely not, your Honor. Absolutely
18 not.

19 THE COURT: Okay. I take that as an
20 officer-of-the-court representation.

21 MR. COLLINS: Thank you.

22 THE COURT: If that's the case, I can't sustain an
23 objection. It's consistent with my prior understanding, and
24 that I never barred nor did I intend to bar direct lenders from
25 hiring counsel themselves.

1 (Colloquy not on the record.)

2 MR. COLLINS: Thank you, your Honor. That's all I
3 have here.

4 THE COURT: Okay.

5 MS. RASMUSSEN: Your Honor, just for the record
6 because I represent Ms. Cangelosi --

7 THE COURT: Right.

8 MS. RASMUSSEN: -- I object to the Court and Silar
9 and anyone else's characterization that Ms. Cangelosi engaged
10 in and illegal, unlawful behavior.

11 THE COURT: I accept the objection, and I overrule
12 it.

13 MS. RASMUSSEN: Okay. And, secondly, I'd like to
14 know how it is that Silar is in possession of a proposed
15 retainer agreement between direct lenders and their counsel.
16 In my practice as a lawyer, I have never handed over --

17 THE COURT: I'll permit you to ask the question.

18 MS. RASMUSSEN: -- a retainer --

19 THE COURT: I'm not going to order them to answer it.

20 MS. RASMUSSEN: Well, I'd ask -- I request that the
21 Court make the inquiry.

22 (Colloquy not on the record.)

23 MS. RASMUSSEN: I think it's an appropriate inquiry.

24 MR. COFFING: It's posted on the receiver's Web site,
25 your Honor, and it was provided --

1 UNIDENTIFIED SPEAKER: Right.

2 MS. RASMUSSEN: Okay.

3 MR. COFFING: -- on the LPG Web site as well for
4 anyone to access.

5 MS. RASMUSSEN: And that's why I was asking because I
6 don't know how it is that they come --

7 THE COURT: Okay.

8 MS. RASMUSSEN: -- into possession of it.

9 I also think that it inappropriate on some level for Silar
10 -- on any level, frankly -- for Silar to be objecting to how it
11 is that Bickel & Brewer will do its job of representing the
12 direct lenders --

13 THE COURT: I already ruled --

14 MS. RASMUSSEN: -- what consultants --

15 THE COURT: -- on that. To the extent --

16 MS. RASMUSSEN: -- it will retain.

17 THE COURT: They do not have standing to the extent
18 they're simply objecting to fraud, to inducing a relationship
19 directly between a lawyer and one of the direct lenders.

20 MS. RASMUSSEN: Okay. And then I --

21 THE COURT: As long as it doesn't involve
22 Ms. Cangelosi or Cross or those who were prohibited in the
23 prior order, emergency motion for order authorizing encumbrance
24 of beneficial interests, as long as it doesn't border on any of
25 those items for which, of course, they do have standing, they

1 do not have standing to complain about that kind of a problem.

2 MS. RASMUSSEN: And then, finally, I just think the
3 record should reflect that although this is an arrangement that
4 they've recently been able to achieve -- the direct lenders,
5 they, and my clients, the 18 that I represent, will likely
6 benefit from it -- it comes at a substantial cost far in excess
7 of the previous agreement that they had arranged which this
8 court order dissolved.

9 (Colloquy not on the record.)

10 MS. RASMUSSEN: So I didn't want to leave the Court
11 with the impression that now they're all protected because, in
12 fact, they were previously protected. Their new arrangement is
13 substantially more expensive to them.

14 And, in fact, they have to disgorge a substantial
15 percentage of what they would earn, and I just want the record
16 to be clear --

17 THE COURT: I'll --

18 MS. RASMUSSEN: -- on that.

19 THE COURT: I'll let you make your statement for the
20 record, but the record is not clear. I have no understanding
21 of such, and you have not presented any record to support that.
22 You made your statement on the record, but there's no showing
23 of that.

24 MS. RASMUSSEN: Well, previously, your Honor, they
25 had engaged counsel at an hourly rate. Now they're paying a

1 percentage. So to the extent that the Court --

2 THE COURT: They hadn't --

3 MS. RASMUSSEN: -- didn't have any understanding --

4 THE COURT: -- just engaged counsel. They had said
5 that we are going to engage Cross who will finance the
6 litigation, retain the counsel.

7 And we are going to give them, what was it, a third or a
8 half of their interests up to 50 percent of their interest. It
9 was something in that nature.

10 They were transferring from what they had transferred to
11 Cangelosi all of their direct-lender interests. They were
12 transferring some huge percentage to Cross which was incredible
13 in my mind.

14 So there is just absolutely no record to support your
15 statement. You've made your statement for the record. There's
16 just no record to support it.

17 MS. RASMUSSEN: Okay.

18 THE COURT: Okay.

19 MR. ASHINOFF: Your Honor --

20 THE COURT: And I've overruled the objection, of
21 course, and their pro hac vice may be granted.

22 MR. ASHINOFF: Your Honor, on the basis of the
23 representations --

24 (Colloquy not on the record.)

25 MR. ASHINOFF: -- I'm not going to object, and I --

1 THE COURT: Okay.

2 MR. ASHINOFF: I heard the Court, and I heard
3 Mr. Collins.

4 THE COURT: Okay.

5 MR. ASHINOFF: But I --

6 (Colloquy not on the record.)

7 MR. ASHINOFF: I raise one issue, your Honor. We
8 have to respond to the motion by the DLA clients to file a
9 putative class-action complaint. We also --

10 THE COURT: Say that again.

11 MR. ASHINOFF: They've asked for permission to file a
12 putative class-action complaint. Of course, the filing doesn't
13 mean it's going to proceed as a class-action.

14 THE COURT: There is --

15 MR. ASHINOFF: And --

16 THE COURT: -- some motion pending --

17 MR. ASHINOFF: No.

18 THE COURT: -- in that regard?

19 MR. ASHINOFF: No. This is where I'm going. To the
20 extent --

21 THE COURT: You're talking about in the solicitation
22 of these people.

23 MR. ASHINOFF: No. That's the other. That's the
24 rub.

25 THE COURT: Where have they made a request to file a

1 putative class --

2 MR. ASHINOFF: DLA Piper Rudnick has moved to file --

3 (Colloquy not on the record.)

4 MR. ASHINOFF: -- a class-action complaint as a
5 representative with the plaintiffs they have --

6 THE COURT: Is it set for some date certain?

7 (Colloquy not on the record.)

8 MS. SHUMENER: We have filed a proposed -- we have
9 filed the motion for leave to file an amended complaint. The
10 amended complaint is a proposed class-action complaint for the
11 three loans in which my clients own substantial interests, so
12 they're the class representatives or proposed class
13 representatives.

14 THE COURT: And is there a hearing set for a hearing
15 on that proposed --

16 MS. SHUMENER: That motion has been set for a while.
17 That's the April 13th motion, your Honor.

18 THE COURT: Okay.

19 MS. SHUMENER: It's set for April 13, and then if
20 that's granted --

21 THE COURT: I just simply --

22 MS. SHUMENER: -- we'll file --

23 THE COURT: -- haven't looked --

24 MS. SHUMENER: -- a motion --

25 THE COURT: -- at that.

1 MS. SHUMENER: -- for a certification --

2 MR. ASHINOFF: Well, your Honor, here --

3 MS. SHUMENER: -- on this.

4 MR. ASHINOFF: Here's my concern. We have that
5 coming from DLA. Now we have from Bickel & Brewer what we
6 understand through the grapevine to be an effort to sign up
7 hundreds if not thousands of individuals.

8 And what we may have is something quite unruly which is
9 one lawyer group putatively representing a class through the
10 representative method and another lawyer group putatively
11 representing the same individuals which can happen.

12 THE COURT: It sounds a little chaotic --

13 MR. ASHINOFF: And --

14 THE COURT: -- and uncoordinated.

15 MR. ASHINOFF: And my concern is --

16 THE COURT: But what beyond that do you want --

17 MR. ASHINOFF: -- we --

18 THE COURT: -- from me?

19 (Colloquy not on the record.)

20 MR. ASHINOFF: Well, we may object to one or the
21 other coming in because of the problem and the trial date and
22 the need to have something finite --

23 THE COURT: Okay.

24 MR. ASHINOFF: -- to finish with discovery --

25 THE COURT: You'll --

1 MR. ASHINOFF: -- and on other --

2 THE COURT: You'll do that I'm sure.

3 MR. ASHINOFF: Okay.

4 THE COURT: April 13th is, apparently, the scheduled
5 date for a hearing on the first motion.

6 (Colloquy not on the record.)

7 MR. ASHINOFF: Well, just whether they can file it
8 which is -- right. That it's not a class-cert --

9 THE COURT: They, of course --

10 MR. ASHINOFF: -- hearing.

11 THE COURT: -- can file it. They have filed it.
12 Whether or not it would be approved is a totally-different
13 thing.

14 MR. ASHINOFF: No. They filed for permission to file
15 the complaint. That's with --

16 THE COURT: That's right.

17 MR. ASHINOFF: Yeah. But we need putative class
18 discovery before there could ever be a hearing or a motion on
19 class cert, and I just don't want to have --

20 THE COURT: They're just advising me --

21 MR. ASHINOFF: -- too many different trains.

22 THE COURT: -- that it's coming. Duck, Judge.

23 (Colloquy not on the record.)

24 MR. ASHINOFF: Your Honor, it's just coming, and
25 thank you --

1 THE COURT: Okay.

2 MR. ASHINOFF: -- for all your time today.

3 THE COURT: Okay.

4 (Colloquy not on the record.)

5 MS. SHUMENER: Yeah.

6 UNIDENTIFIED SPEAKER: Thank you, your Honor.

7 MS. SHUMENER: Thank you, your Honor.

8 MS. RASMUSSEN: Thank you, your Honor.

9 THE COURT: Thank you, Counsel.

10 (Colloquy not on the record.)

11 MR. ASHINOFF: Well, two --

12 MS. RASMUSSEN: Your Honor --

13 MR. ASHINOFF: Two --

14 MS. RASMUSSEN: Oh, sorry.

15 MR. ASHINOFF: Two things on dates. If it's possible
16 to change the June 8 date to either June --

17 THE COURT: That's off calendar.

18 MS. SHUMENER: It's off calendar, yeah.

19 MR. ASHINOFF: Oh, it is.

20 MS. SHUMENER: We just got --

21 THE COURT: That's --

22 MS. SHUMENER: -- (indiscernible).

23 (Colloquy not on the record.)

24 THE COURT: We have approved the sale.

25 MR. ASHINOFF: Oh, we don't need that, anymore.

1 MS. SHUMENER: Yeah, yeah.

2 MR. ASHINOFF: Thank you.

3 MS. SHUMENER: Yes.

4 THE COURT: Yep.

5 MR. ASHINOFF: Thank you. Thank you.

6 (Colloquy not on the record.)

7 MR. ASHINOFF: And the other thing is --

8 MS. SHUMENER: You can go to the graduation.

9 MR. ASHINOFF: -- can we get two more days to respond
10 to your motion given that we ended up here --

11 MS. SHUMENER: Absolutely not.

12 (Colloquy not on the record.)

13 MR. ASHINOFF: Can I take that as a yes?

14 MS. SHUMENER: It's been pending for weeks and weeks
15 and weeks and weeks.

16 MR. HOWARD: I'm sorry, your Honor.

17 THE COURT: Step outside and make the request.

18 MR. HOWARD: That's Los Angeles counsel --

19 THE COURT: If they don't grant it --

20 MR. HOWARD: -- talking.

21 THE COURT: -- of course, direct it to me.

22 MR. ASHINOFF: Thank you for your time today,
23 your Honor.

24 MS. SHUMENER: Thank you, your Honor.

25 THE COURT: Thank you so much.

1 (Colloquy not on the record.)

2 THE COURT: Okay.

3 THE CLERK: All rise.

4 (Court concluded at 04:55:29 p.m.)

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1 I certify that the foregoing is a correct transcript
2 from the electronic sound recording of the proceedings in
3 the above-entitled matter.
4
5

6 /s/ Lisa L. Cline

03/20/09

7 Lisa L. Cline, Transcriptionist

Date

8
9
10 /s/ Michele Phelps

03/20/09

11 Michele Phelps, Transcriptionist

Date